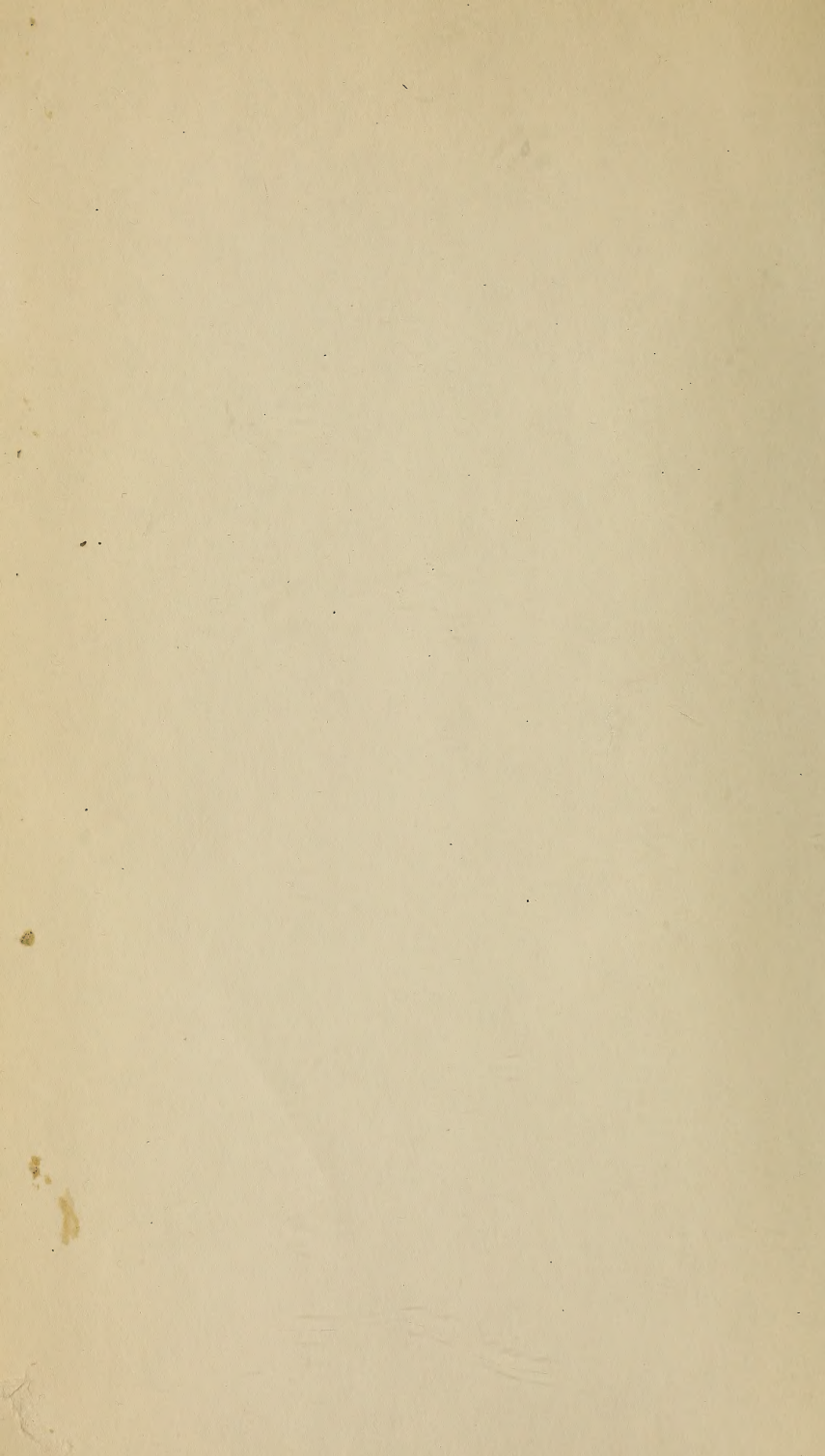


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REPORT OF CASES

DECIDED IN THE

COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q.C.,
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

VOL. XXVII.

CONTAINING THE CASES DETERMINED
FROM EASTER TERM 30 VICTORIA, TO MICHAELMAS TERM, 32 VICTORIA
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
HENRY ROWSELL.
1869.

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JUDGES

OF THE

COURT OF QUEEN'S BENCH.

DURING THE PERIOD OF THESE REPORTS.

THE HONORABLE WILLIAM HENRY DRAPER, C. B., *Chief Justice.*
“ “ WILLIAM BUELL RICHARDS, *Chief Justice.*
“ “ JOHN HAWKINS HAGARTY, J.
“ “ JOSEPH CURRAN MORRISON, J.
“ “ ADAM WILSON, J.

Attorney-General:
THE HONORABLE JOHN SANDFIELD MACDONALD.

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REPORT OF CASES
IN THE
COURT OF QUEEN'S BENCH.

EASTER TERM, 30 VICTORIA, 1867, (*Continued.*)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

MOORMAN v. FARMER.

Receipt of notes to collect—Unauthorized sale—Liability of defendant.

Plaintiff gave two notes against F. to the defendant, a Division Court Clerk, to collect, and to apply on a note for \$300, which the plaintiff owed to the defendant. The defendant sold the two notes to one M., guaranteeing their recovery, and M. having recovered judgment against F., but made nothing thereon, obtained back from the defendant what he had paid. Defendant transferred the note for \$300 to T., who sued the plaintiff thereon and recovered judgment.

Held, that the plaintiff could recover from the defendant the money received by him from M. as money had and received, for the defendant had no authority to make the conditional transfer; and as F's notes were extinguished by the judgment recovered on them, and the holder of the plaintiff's note had recovered judgment against him, the defendant had rendered it impossible to restore the plaintiff to his original position.

APPEAL from the County Court of Hastings.

The first count of the declaration was on a special agreement, that the defendant, being Clerk of the Eighth Division Court of the County of Hastings, received two promissory notes from the plaintiff, made by one Ford, and overdue, and then agreed—in consideration that he might make a profit as such Clerk* by way of fees in suing the same, and that he

might apply the proceeds, when collected, on an indebtedness by the plaintiff to himself—to sue said notes in said Court, and proceed to judgment and execution within a reasonable time, and apply the proceeds, when collected on a promissory note given by the plaintiff to him. The breach alleged was that the defendant did not sue the said notes, but, on the contrary, sold them, and transferred the same away, and received the proceeds thereof, and transferred also the note he held against the plaintiff—whereby the plaintiff lost the advantage of an early judgment against the said Ford, under which the amount of the said notes, or a great part thereof, might and could have been made.

The second count was for money had and received. Defendant pleaded to the first count: 1, Non-assumpsit; 2, That the defendant did not lose the advantage of an early judgment against Ford; and 3, That before the defendant could have obtained judgment in due course of law as such clerk, prior judgments had been obtained against Ford, so that if the defendant had put the notes in suit in the Eighth Division Court they could not have been collected. There was another plea, an equitable one, which was decided on demurrer; and another of set-off, under which no evidence was offered. The plaintiff claimed to recover on both counts. To the second count never indebted was pleaded.

It appeared in evidence at the trial that the defendant received two notes against one Ford, and undertook to collect them in the Eighth Division Court, of which he was then Clerk, and to apply the proceeds, when collected, on a note he held against the plaintiff, for wood sold to him: that instead of suing the notes in the Division Court he transferred them to one Muchall, receiving the full amount, and undertaking to repay the amount to him if not collected from Ford. A suit was commenced in the name of Muchall, in the County Court, against Ford, and carried to judgment, in which nothing was made, and the defendant, in compliance with his undertaking, repaid to Muchall the money advanced by him, the judgment still standing in the name of Muchall, no assignment having been tendered to

the plaintiff, but one having been executed and ready to be delivered to him. It also appeared that the note held by defendant against the plaintiff, for \$300, had been transferred by defendant to one Jones, who had recovered judgment upon it against the plaintiff.

A verdict was entered by consent for the plaintiff of one shilling on the first issue, and for the defendant on all the other issues in fact on the record, with leave to the plaintiff to move to enter the verdict for him on the fifth issue, and to increase it to \$152.98 on the first and fifth issues, if the Court should think him entitled to it.

A rule *nisi* in accordance with the leave reserved was granted in the Court below, and on its argument the plaintiff, by his counsel, claimed the amount of the notes and interest as damages on the first issue, and urged the right to recover that amount on the second count as money had and received by the defendant to his use.

This rule, after argument, was discharged, the learned Judge considering, as to the second count, that the case of *L'Esperance v. Clark*, 4 U. C. R. 12, was against the plaintiff.

The plaintiff appealed.

Jellett, for the appellant.

Dougall, contra.

DRAPER, C. J., delivered the judgment of the Court.

The plaintiff had two notes against Ford. He owed the defendant a note of \$300. Defendant was Clerk of the Eighth Division Court. Plaintiff delivered the notes against Ford to the defendant for collection, and the proceeds to be applied, when collected, to pay so much of the \$300 note.

Defendant sold the two notes to M., and received the full amount thereof, but guaranteed the recovery. M. recovered judgment against Ford, but failed in getting any satisfaction thereon. Defendant transferred the note for \$300 to J., who sued the plaintiff thereon, and has recovered judgment. M. has called on the defendant on his guarantee, and has received back from him what he paid for Ford's two notes.

Plaintiff contends that the sale to M. must be treated as a receipt of so much money for the plaintiff's use, and that, as the defendant has parted with the note he held against the plaintiff, who is liable to a stranger on it, he, the plaintiff, has a right to recover.

Was the transfer to M. a wrongful act as regards the plaintiff? or, in another form of question, did not the money really belong to the plaintiff, and was it not virtually a payment of his own note *pro tanto*, if the defendant held it, and if not, then absolutely?

The notes against Ford are extinguished, for M., as holder, has recovered judgment upon them, which judgment is still, for all that appears, in force, and the holder of the note which the defendant had against the plaintiff has become a judgment creditor of the plaintiff thereon.

The defendant's act in regard to both transactions has rendered it impossible to restore the plaintiff to his original position, nor can he give credit to the plaintiff on the note he, (defendant) held against the plaintiff when the delivery of the two notes made by Ford took place.

By the receipt of the money from M. the defendant became accountable to the plaintiff. He ought to have credited the plaintiff with the sum, as he agreed to do, but he had transferred the note, either for value, or the judgment upon it is recovered against the plaintiff for the defendant's benefit.

Under these circumstances, we think the plaintiff has a right to recover the money, as received to his use, which M. paid to the defendant, who had neither authority nor consent to make the conditional transfer.

In *L'Esperance v. Clark* (4 U. C. R. 12), one T. made a note, payable to the plaintiff, who endorsed it in blank, and gave it to the defendant, who was to account to him for the proceeds "*if paid*." Defendant subsequently endorsed and discounted it, and retired it again by a renewal note made by T. in the plaintiff's favor, *which the plaintiff also endorsed*, and which renewal note was still unpaid and outstanding.

The second note was by the plaintiff's consent, therefore, substituted for the first, and he became a party to the use

made of the first, and was bound to await the maturity at least, if not indeed the payment, of the second, ere he could claim that the defendant had obtained payment within the meaning of their agreement.

Here there is no act of the plaintiff ratifying what the defendant has done. Defendant got the amount of Ford's notes by an absolute transfer of them, and the transferee has recovered judgment against Ford. The cases are plainly distinguishable.

We think the plaintiff should have a verdict on the count for money had and received, for the full amount.

The appeal should be allowed, and the rule *nisi* in the Court below made absolute accordingly.

Appeal allowed.

COLEMAN V. KERR.

Assessment—Authority of collector—Form of Roll—C. S. U. C. ch. 55, sec. 89; ch. 54, sec. 174.

A Board of School Trustees in a town passed a resolution stating the sum required for school purposes, of which their treasurer gave notice to the town clerk, verbally or in writing, but not under the corporate seal. The corporation, however, made no objection, and acted upon it as an estimate. *Held*, that though it would have been insufficient on application to compel the town to levy the money, yet an individual rate-payer could not object.

Sec. 24 of the Assessment Act, C. S. U. C. ch. 55, applies to the assessor's roll only, not the collector's.

Defendant was duly appointed collector of the municipality for the years 1865 and 1866. *Held*,—following *Newberry v. Stephens*, 16 U. C. R. 441, *Chief Superintendent of Schools v. Farrell*, 21 U. C. R. 441, and *McBride v. Gardham*, 8 C. P. 296—that he had authority in 1866 to distrain for the taxes of 1865 upon the owner of premises duly assessed.

Defendant held two rolls, each headed "Collector's Roll for the Town of Belleville," one being also headed "Town Purposes," the other "School Purposes." In the first, the column headed "Town or Village Rate" contained nothing, but in that headed "Total Taxes. Amount," \$40 was inserted. In the other that column had nothing, but \$16 was in the column headed "General School Rate." *Held*, insufficient, for there was nothing to shew for what purpose the sum not specified to be for school rate was charged.

Spry v. McKenzie, 18 U. C. R. 165, distinguished.

The omission to set down the name in full of the person assessed was treated as immaterial.

APPEAL from the County Court of the County of Hastings.
Replevin for chattels taken in a dwelling house, occupied

by the plaintiff, in Samson Ward, in the Town of Belleville, on the 2nd of May, 1866.

Avowry, setting forth that the Corporation of Belleville passed a by-law to levy a tax for municipal purposes for the year 1865, and enacted that a certain sum in the dollar should be levied on the whole ratable property, and thereby also appointed the defendant collector of Ketcheson Ward, in the said town. The 174th section of the Municipal Act was stated, and that this by-law continued in force until after the said time, when, &c. : that—after the assessment roll was finally revised and completed, and all due adjustments and equalizations had been made, and after the Board of School Trustees of the said town had, as a corporation, struck a rate on all the assessable property for common school purposes, and had made a return of the amount thereof to the Clerk of the municipality of Belleville, and after the School Trustees had duly appointed the defendant collector of common school rates for Ketcheson Ward for that year (1865), and after the Clerk of the municipality had made out a collector's roll for Belleville, in which (among other particulars set forth), in a column headed "town rates," the amount with which each party was chargeable, in respect of real and personal property, in respect to the sums ordered to be levied for town purposes, was set down, and after the said Clerk had, opposite to the property of each party named therein chargeable by the assessment, set down in a column named "school rate," the amount with which such party was chargeable in respect to the sum ordered to be collected for common school purposes, and after a similar collector's roll duly certified had been made for the collector of the common school tax of Ketcheson Ward, and the proper sum according to such school rate had been set opposite each parcel of land and the name of each party—the town clerk, within the time required by law, delivered the collector's roll to the defendant, and the common school rate roll was also duly delivered to him. And because the plaintiff was, at the time when the assessments for the said ward and the said town were made, the owner of certain freehold premises

situate within Ketcheson ward, and was named and rated in the collector's roll for that ward as owner thereof, for \$40, in respect to his assessable real property in that ward, as a town rate, and on the school rate roll in that ward for \$16, in respect to the same real property, the plaintiff not being liable to any separate school rate. And defendant further says that one Blacklock was assessed on the said rolls as tenant of the said real property under the plaintiff, and the said sums at the said times, when, &c., were in arrear and unpaid by the plaintiff or Blacklock in respect of the said premises, and Blacklock had removed therefrom and a stranger to the assessment was in possession. And because the plaintiff at the said time when, &c., and for a long time before, was domiciled within the town of Belleville, and the defendant after he had received the said rolls, and while they continued in his hands, he never having been removed from the office of collector by the municipality, nor by the school trustees; and while the by-laws of the municipality and the resolution of the trustees were in full force, and before the return of the rolls, and not being able to make oath before the Treasurer in respect of the sums due by the plaintiff, pursuant to sec. 106 of the Assessment Act, and after the plaintiff and Blacklock had neglected and refused to pay the said sums, and after the defendant had called at least three times on them and demanded those sums, the plaintiff being the person who ought to pay, the defendant took the said goods, then in the plaintiff's possession, for the purpose of levying the said moneys, &c.

The plaintiff joined issue on this avowry, and also pleaded to it that he was not the person who ought to pay the taxes. He also demurred to the avowry, and the defendant demurred to the plea thereto. Both demurrers were decided in the defendant's favor.

Upon the trial of the issue in fact, it was at the close of the plaintiff's case objected:

1. That it was not proved that the school trustees duly struck a rate, or made any requisition, return or request, in

accordance with law, on the Clerk or the Town Council of Belleville, to collect a school rate.

2. That the plaintiff and Blacklock were not duly assessed, according to law, as owner and occupant, the collector's roll showing that they were assessed as freeholder and householder.

3. That it was not proved that the defendant had any authority to collect taxes at the time the seizure was made.

4. That the collector's rolls shew that the plaintiff's name is not set down in full as required by the Statute, and that the amount which is chargeable is not put down on either roll as "Town Rate," or for what purpose the party was assessed.

There were other objections taken both at the trial and on the appeal book, but the foregoing were all that were taken at the trial and relied on on the hearing of the appeal. There was another objection taken on the appeal book, but it did not appear to have been raised in the Court below, and it was not, therefore, argued.

The principal facts in evidence appeared to be as follows: The defendant put in two collector's rolls for 1865—one for the town taxes of the town of Belleville, the other for the school tax. In each of these the property was assessed, as No. 43, west of Front Street, and it was proved that it was a stone house of which James Blacklock was entered on the roll as the "Householder," and the plaintiff, by the name of C. L. Coleman, as the "Freeholder." It was proved that each of these rolls was made out by the Town Clerk, and after certifying them he delivered them to the Treasurer, who handed them to the defendant. A By-law was proved, passed by the Town Council in relation to the town tax. The Town Clerk proved that he got notice from the Treasurer of the Board of School Trustees of the rate imposed by them, but he could not say if it was in writing: he got no copy of the resolution under their corporate seal. It was also proved that the school rate was levied by resolution, and not by by-law of the School Trustees; and that Board, by a resolution passed on the 27th

of November, 1865, appointed the defendant their collector for 1865. He was collector of the town taxes for Ketcheson and Coleman Wards in 1864, 5, and 6.

There was sufficient proof that the defendant demanded the taxes of the plaintiff, who refused to pay them, insisting on their being collected from Blacklock, who it appeared continued to reside in Belleville, though he gave up possession of these premises in April, 1865, after which it was sworn that the plaintiff had possession of them. The plaintiff was present when the seizure was made. He admitted that a demand had been made on him, and he then refused to pay. At that time the town tax was mentioned as being \$40, and the school tax \$16, and it was understood to be for premises formerly occupied by Blacklock.

It was agreed that a verdict should be entered for the defendant, with leave to the plaintiff to move to enter a verdict for himself, the goods being admitted to be equal in value to the taxes claimed. A rule *nisi* in pursuance of the leave reserved having been obtained, and after argument discharged, the plaintiff appealed.

C. S. Patterson for the appellant,
Dougall, contra.

In addition to the Statutes and authorities referred to in the judgment, *Rex v. Welbank*, 4 M. & S. 222, was cited for the appellant; and *Municipality of Whitby v. Flint*, 9 C. P. 453; *Wilson v. Municipality of Port Hope*, 10 U. C. R. 405; *Fraser v. Page*, 18 U. C. R. 327; *Hope v. Cumming*, 10 C. P. 118; *Skingley v. Surridge*, 11 M. & W. 503; and *Allen v. Sharp*, 2 Ex. 352, for the respondent.

DRAPER, C.J., delivered the judgment of the Court.

As to the first objection: the Board of School Trustees apparently intended to act (though we must say, as far as is shewn, with very inadequate attention to the language of the Statute) under the 11th subsection of sec. 79 of the Common School Act, Consol. Stat. U. C., ch. 64, which authorizes them to prepare and lay before the Municipal

Council an estimate of the sums they consider requisite for the common school purposes of the year. It is proved that they passed a resolution for this purpose. A book containing it was produced at the trial, but no copy of it is before us. No objection seems to have arisen as to its being sufficient in terms, if a resolution and not a by-law constituted an "estimate" within the Statute. The Treasurer of the School Trustees gave notice of it to the Town Clerk of Belleville, whether in writing or not he could not say, though it certainly was not authenticated by the corporate seal of the Board of School Trustees. This mode of proceeding would, we have little doubt, have been held insufficient on an application for a mandamus to the Town Council to enforce payment, (see *School Trustees v. Port Hope*, 4 C. P. 418; *School Trustees v. City of Toronto*, 20 U. C. R. 302); but no objection was raised by the town corporation, and their Clerk acted upon the communication made to him as an estimate laid before the municipality. Under these circumstances, we are of opinion that an individual rate-payer cannot be heard to take the objection.

The second objection is rested upon sec. 24 of the Assessment Act, which declares that when the land is assessed against both owner and occupant the assessor shall on the roll add to the name of the owner the word "owner," and to the name of the occupant the word "occupant," and the taxes may be recovered from either. But this is the collector's, not the assessor's roll. It is made out under sec. 89, which requires the *name* of the person assessed, but does not require either the word "owner" or "occupant" to be added thereto. The objection, therefore, has not the foundation on which it was said to be based, and assuming that the Statute was imperative on the assessor, and not merely directory, it does not extend to the collector's roll.

The third objection attacks the proof of the authority, and it may be said the authority itself, of the collector to collect the taxes at the time the seizure was made.

This objection seems to concede that the collector had at one time the necessary authority, and the argument in

support of it involved that concession, for it was pointed out that the collector was appointed only for the year 1865, and the 104th section of the Assessment Act was expressly referred to for the purpose of shewing that he should have returned his roll on the 14th of December, and it was urged that the time was not legally extended; and moreover it was strenuously argued that the case of *Newberry v. Stephens*, (16 U. C. R. 65) was distinguishable, on the ground that there the time had been extended, while here no extension was proved.

The difficulty arising from there being two rolls, which, unless blended into one, would not shew that both town and school tax were directed to be levied and collected, and from the want of any proof that the Town Clerk was authorized by the Municipal Council to act upon the estimate of the Board of School Trustees, was not presented on this objection for our consideration, although it was admitted during the argument of the defendant's counsel, (who evidently rested his case on the theory that the distress was made under the authority of the School Trustees) that the estimate never was laid before the Town Council. We take the only question which we are to dispose of on this objection to be, whether the defendant had a continuing authority to collect and enforce payment of these taxes when he made the distress.

The facts are simply, that he was duly appointed collector of the municipality for the year 1865-1866. This, as regards 1865, is conceded both by the form of the objection and by the argument used in support of it, that the time for returning his roll was not extended. He received the two rolls spoken of in 1865, and he held them both in 1866, when he made the distress.

The plaintiff contends that under these circumstances, as the Statute required him to return his roll on the 14th of December, 1865, he became *functus officio*, at least as regarded the compulsory powers of enforcing payment.

On the other hand, the defendant relies on the 174th section of the Municipal Act: "The Chamberlain or Treasurer

may "be paid a salary or percentage, and all officers appointed "by a council *shall hold office until removed* by the "council."

The case of *Newberry v. Stephens* (16 U. C. R. 65), appears to us to be in the defendant's favor, though the Court were not unanimous. But Robinson, C.J., and Burns, J., both held that the collector for 1855, who was again collector for 1856, could in the latter year enforce by distress payment of rates imposed in 1855, though at the time he distrained there was no resolution in force extending the time for him to return his roll. This decision does not appear to be rested either on the ground that the same person was the collector for both years, or that there had been an extension which expired before, and that another extension was made after the distress was made. If the collector was *quoad* the taxes of 1855 *functus officio* on the termination of the first extension, he was without authority when he distrained. The subsequent extension could not have an *ex post facto* operation.

This Court acted upon *Newberry v. Stephens*, or at least in accordance with its principle, in the *Chief Superintendent of Schools v. Farrell*, (21 U. C. R. 441); and the Court of Common Pleas recognized its authority in *McBride v. Gardham*, (8 C. P. 296.)

On these authorities, we think this objection untenable.

There remains only the fourth objection. So far as it regards the not setting down the plaintiff's name in full, it was, we think, properly given up on the argument; but strong reliance was placed on the allegation that the two collector's rolls shew that the amount which is chargeable against the plaintiff is not put down in either as a "Town Rate," nor is it otherwise shewn for what purpose he was assessed.

Each of these rolls is headed "Collector's Roll for the Town of Belleville," and to this heading is added in one roll, "Town Purposes," in which in the column headed "Town or Village Rate" nothing is entered; but in another column headed "Total Taxes. Amount," are inserted the figures, "\$40."

In the other there are added to the general heading the words, "School Purposes," and there is a column headed, "General School Rate," in which are added the figures '\$16,' and in the column headed "Total Taxes. Amount", there is nothing entered. In each roll the names James Blacklock and C. L. Coleman are entered, and the property and the valuations thereof are alike in each.

We are constrained to the conclusion that this objection has not been displaced. Treating the two rolls as constituting in law one collector's roll, this one roll constituted his sole authority in the nature of a warrant to compel payment, and it ought to shew the several taxes which constituted the aggregate amount, stated in the manner directed by the 89th section of the Assessment Act. And according to that section the amount with which a party is chargeable in respect to sums ordered to be levied by the Town Council "*shall be*" set down in a column, to be headed "Town Rate," and in a column to be headed "School Rate" shall be set down any school rate. Now, although there is in each of these rolls a column properly headed for a town rate, no amount is set down under this heading in either. In one the sum \$40 is set down in the column headed "Total Taxes," in the other the sum \$16 is entered in a column headed "General School Rate," and no entry is made as to amount in any other column, so that, blending the two, we have a roll charging in the school rate column \$16, and in the total tax column \$40, but not shewing, except as to the \$16, for what purpose the difference is charged. And if we treat them as separate rolls, the roll headed "Town Taxes" has no amount charged except in the column headed "Total Taxes;" and the school purpose roll appears to have been made out by the Town Clerk of his own proper motion—not directed by the Board of School Trustees, if indeed they had any control over him, or authorized by the Town Council, who are not proved to have had the estimate of the Board of School Trustees ever brought under their notice.

In neither way, as appears to us, can this distress be

upheld. As regards the town tax, we see no reason for a doubt. As to the school tax, we endeavored to find a sufficient ground for upholding it as levied under a separate roll issued under the authority of the trustees, and distrained for by the defendant as their collector appointed by resolution, as was stated in evidence. But the 12th subsection of section 79 of the School Act only gives the power of trustees of common school sections in townships to Boards of School Trustees in towns, to levy rates on the parents or guardians of children attending a school under their charge. The facts of this case do not bring it within that provision.

The learned Judge in the County Court seems to have relied on a *dictum* in the judgment in *Spry v. McKenzie*, (18 U. C. R. 165) to the effect that a bailiff would not be liable as a wrong-doer for executing a warrant legal on its face, and made to him by public officers who had authority to make such a warrant by Act of Parliament. That was an action of replevin for a horse, under our Statute, which authorizes that form of suing wherever trespass or trover would lie, brought against the defendant, who pleaded that a collector of school taxes, under a warrant from the school trustees, had seized the horse and placed it in his hands as an innkeeper. But there was no avowry, only this plea by way of justification of the detention. In *Haacke v. Marr*, (8 C. P. 441) the distinction between such a plea and an avowry is pointed out, and it is held that an avowry must shew a good title *in omnibus*. That case was not referred to in the Court below, nor was this distinction noticed in the argument before us. But it confirms our opinion that the present avowry cannot be upheld.

We may as well add that no objection was taken to the plea in *Spry v. McKenzie*. It does not aver that the collector came to the inn as a guest, which, perhaps, was necessary according to the case of *Smith v. Dearlove*, (6 C. B. 132.)

On the whole, we are of opinion that this appeal must be allowed, and that the Court below should make absolute the rule to enter the verdict for the plaintiff.

The case of *Corbett v. Johnston* (11 C.P. 317) is so clearly distinguishable in its facts from the present that we merely mention it in order that it may not be supposed it was overlooked by us, especially as it was relied upon in the Court below.

Appeal allowed.

HOLLAND V. VANSTONE.

Lease—Eviction from part—Right to distrain.

Defendant leased certain premises to the plaintiff by deed for three years, there being at the time another person in possession of a part as a monthly tenant, who was afterwards succeeded by two others, holding under the defendant.

Held, affirming the judgment of the County Court, that the lease to the plaintiff being under seal, operated as a grant of the reversion (with the rent incident thereto), as to the part thus held, and that the defendant was entitled therefore to distrain for the whole rent in arrear.

Kelly v. Irwin, 17 C. P. 356, remarked upon, and not followed.

APPEAL from the County Court of Huron.

Replevin.

Avowry, that the plaintiff held certain premises, (which were set out, according to the description in a lease produced in evidence), being lot number 5, in Main Street, Exeter, containing three-fifths of an acre, or thereabouts, together with the dwelling-house, barns, stables and other erections thereon, and on lot number 4, then (meaning on the 10th of May, 1864,) in the occupation of the defendant, and, secondly, certain other village lots described, comprising twelve acres, more or less, as tenant to defendant under a demise thereof at a yearly rent of \$140, payable half-yearly, on the 1st days of November and May in each year, by even portions during the term; and because \$210 was in arrear at the time, avows taking, &c.

Plea, that before and at the time of the demise, one Mrs. St. John was from thence until after six months from the date of the demise in possession of part of the premises, and of a certain building thereon, as tenant to defendant,

and at the end of said demise to St. John, another tenant, whose name is unknown to the plaintiff, took and acquired possession of said part of the premises, and of said building, as tenant thereof to defendant, and so occupied as tenant to defendant, under and by virtue of a certain demise theretofore made by defendant to said party, when, and immediately thereafter, one Roach, then, and before the commencement of the action, and before the accruing of the rent or any part, was, and from thence hath been, and still is in possession of said part as tenant to defendant, who thereby evicted the plaintiff therefrom; and the plaintiff avers that all of said parties respectively had possession of said part continuously from the date of the demise till now, under several demises severally and respectively made to them by the defendant before the accruing of the rent, which several demises were continuously during the accruing of all the rent in force and undetermined, whereby the plaintiff could not enter into or hold said part—averring the plaintiff's willingness to enter into said part, and his demand of possession thereof from the defendant; that such part was material to the enjoyment of the demised premises, and he had been kept out of possession of said part by the act and default of the defendant.

The replication set out the demise by indenture, and traversed that Mrs. St. John, or the other person, on the 1st of May, 1864, or since, were in possession of any part of the demised premises. The plaintiff took issue.

The case was tried in December, 1866.

A lease under seal from defendant to the plaintiff for three years from the 1st of May, 1864, was proved, with the usual covenants, under which lease the balance of the first year's rent had been distrained for; and evidence having been given on both sides, a verdict was taken for the plaintiff, with leave to the defendant to move to enter a verdict for himself on the evidence, the Court to draw inferences of fact.

The defendant's objections were—1. That from the

wording of the lease the house was not included in the demise, the evidence shewing that at the time of the demise it was in the possession of Mrs. St. John. 2. That the demise being under seal, the whole rent is claimable, and the lessee could not set up the tenancy of Mrs. R. in opposition to the defendant's claim. 3. That there was no eviction, nothing to prevent Holland taking possession; he never demanded rent of the tenants, or demanded possession of the defendant.

The learned Judge below made the rule absolute to enter a verdict for the defendant, on the authority of *The Ecclesiastical Commissioners of Ireland v. O'Connor*, 9 Ir. C. L. Rep. 242; holding that notwithstanding the occupation of Mrs. St. John and other persons mentioned in the pleadings, of the small dwelling-house on lot number 5, referred to in the evidence, the demise by defendant to the plaintiff being under seal, the defendant was entitled to distrain for the rent in arrear, though it should be held, on the construction of the lease, that the house was part of the demised premises.

From this judgment the plaintiff appealed.

S. Richards, Q. C., for the appellant, cited *Carey v. Bostwick*, 10 U. C. R. 156; *Kelly v. Irwin*, 17 C. P. 351; *Neale v. Mackenzie*, 1 M. & W. 747.

Moss, contra, relied on the case followed in the Court below, and cited *Doe Bullen v. Mills*, 4 N. & M. 25; *Palmer v. Ekins*, 2 Ld. Raym. 1550.

The facts of the case are sufficiently stated in the judgment of the Court.

HAGARTY, J., delivered the judgment of the Court.

Nothing can be more inexactly stated than the evidence in this case. It is very hard to get at the facts clearly. As far as we can understand them, there were two buildings on lot 5, a large and a small house, and at the time of the demise a Mrs. John, or St. John, was living in the small house. She swears: "I rented a small house from Mr.

Vanstone in May, 1864; I was living in the house; my sister-in-law lived in it; I rented in July, when she left. I lived there three months about; I was living there when Holland came to the large house; he never demanded possession from me, nor did he demand the rent; the rent was paid to the defendant.

Mrs. Roach swore: "I live in a house, and rent from Vanstone, the house in dispute. I rented before May, 1865, at \$2 per month; there was a schoolmaster in before I went in. Mrs. John was there before that; defendant never demanded rent."

Another witness proved that Mrs. John was in the small house in May, 1864; then it was occupied as a school-room; then for about a week by a milliner; then by Mrs. Roach. In March, 1865, it was proved, that at an interview between the parties, Holland refused to pay his rent unless he got possession of the part held by Mrs. Roach. Vanstone threatened to distrain, and denied that he had leased the house Roach was in to the plaintiff. This witness said that after the milliner left it was at least a month before Roach went in.

It would seem that the landlord acted as under the impression that the small house was not included in the plaintiff's lease, as not being in his occupation at the time.

The facts seem to be that Mrs. St. John was in possession when the lease was made; we should infer as a mere monthly tenant; that she left in two or three months; then there was a school there, then a milliner, and after an interval of a month then Mrs. Roach, as a monthly tenant. All these were independent holdings, not each under the other.

The plaintiff held by lease under seal for three years. He was either not entitled to this small house at all, as not included in the lease, or if included in the lease, and a succession of monthly tenants got into possession under the landlord, their holding (except Mrs. John) could not prevail against his (Holland's) prior demise, and he could eject them or make them attorn to him. There is no evi-

dence or pretence of any forcible eviction of the plaintiff, and the demises to them would, as against the demise to the plaintiff, simply pass nothing. On the contrary, it is said that for at least a month during the first year there was no one in the house, and nothing to prevent the plaintiff taking possession. As to Mrs. John's short occupation, she had left before the first half-year accrued, and the reversion after her term would pass by the deed to the plaintiff.

The Irish case, relied on by the learned Judge below, fully bears out his position, that as the demise was by deed for a term of years, it must also operate as a grant of the reversion as to the part held by Mrs. John as tenant from month to month of defendant, and so, as the reversion had passed, an interest in the whole had been conveyed, and the tenant was clearly in under the lease, and could not resist payment of the rent. This case was decided about 1858, and against it the case of *Neale v. Mackenzie* was strongly urged, but distinguished, we think, on very intelligible grounds.

The first report of *Neale v. Mackenzie* is in 2 C. M. & R. 84. A parol lease for one year was made of one hundred acres. A prior demise of eight acres had been made to another, and so the tenant could not get possession of all he bargained for. The question of the right to distrain came up on demurrer. Judgment was given by Lord Abinger (Parke, B., concurring) in favor of the right to distrain, the Court saying that "the lease enures as a present demise, giving a right to immediate possession of the residue of ninety-two acres for one year, and passed (not the reversion, because that lies in grant, and the lease in question is not under seal), but an *interesse termini* in the remaining eight acres for one year from the date of the lease, so as to give a right to a term for all that period, and to the possession on the determination of the prior lease by efflux of time, or by any other lawful mode; for, as the existence of the prior demise of part is the only impediment which prevents the present operation of the

lease as to that part, it should seem that in whatever way that impediment is removed the new lease must take effect in possession."—Citing Bac. Ab., Leases, N.; 2 *Preston's Conveyancing*, 150.

This decision was reversed in error (1 M. & W. 747). Lord Denman gave the judgment of the Court. He notices the language of the pleading, that the previous demise of the eight acres was then, and from thence had been, and still was in full force and undetermined, and says, "It appears to us that no interest in the eight acres previously demised passed to the plaintiff by the demise subsequently made to him. The previous demise covered the whole time during which the rent distrained for accrued." He then notices the argument that the case must be governed by the same principle as that of an eviction by title paramount (in which case the rent could be apportioned,) and adds, "If any interest in the eight acres did pass to the plaintiff under this demise to him, we might possibly be disposed to accede to this view of the case. * * It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that this demise to the plaintiff of the eight acres in question was wholly void."

He reviews the authorities at length, and points out very clearly the effect of demise by deed for years passing the reversion in any prior lease for a lesser period.

Our Court of Common Pleas, in *Kelly v. Irwin*, (17 C. P. 356) has arrived, apparently, at a conclusion different from that of the Irish Court, but the latter case was not cited or noticed in the argument or the judgment, and nothing said as to the demise by deed passing the reversion. *Neale v. Mackenzie* was quoted and relied on, but the distinction as to parol demise and demise by deed not brought under the notice of the Court.

In the Irish case, Lefroy, C. J., says, "*Neale v. Mackenzie*, instead of being an authority in support of the present defence, is, for the very reasons given by Lord Denman, when delivering the judgment of the Court of Exchequer Chamber, an authority for upholding this demurrer; for the

distinction there taken was, that the second lease, made by the defendant in error, was utterly void, inasmuch as with respect to eight acres, part of the demised premises, no interest at all passed to the lessee—not even a reversion, which can only be granted by deed under seal. * * In *this* case it was a lease in possession of all the land of which the lessors had the possession at the time of the demise; and, in point of law, it was a lease of the reversion of that part of the land of which the lessors had not the possession.”

In our view of the law it is unnecessary to discuss the not very easy question as to whether the small house is or is not included in the description (a). If it were necessary to decide it, we should desire the evidence to be somewhat more explicit as to the different buildings. On a question of parcel or no parcel, although the Court must decide on the legal effect of written documents, the Jury may be often required to determine certain facts necessary for the right discharge of that duty by the Court.

We think the appeal should be dismissed with costs.

Appeal dismissed.

MARGARET CHRISTIE, ADMINISTRATRIX OF ROBERT CHRISTIE,
v. CLARK.

Administration—Good-will of business—Statute of frauds.

Held—Affirming *Christie v. Clark*, 16 C. P. 544, and the judgment of the County Court in this case—1. That the grant of letters of administration had relation back to the death of intestate, so as to enable the administratrix to sue upon a contract made by her before such grant, for the sale of the good-will of intestate’s business as a surgeon and physician.

2. That although the administratrix was not bound to sell such good-will, yet, having done so, the proceeds were assets, for which she must account.
3. That as the vendor’s part of the bargain was to be performed within a year, the Statute of Frauds did not apply.

APPEAL from the County Court of Brant.

(a) Upon this point *Doe Miller v. Dixon*, 4 O. S. 101; *Doe v. Burt*, 1 T. R. 704; *Dyne v. Nutley*, 14 C. B. 122; *Lyle v. Richards*, L. R. 1 H. L. 122; *Webber v. Stanley*, 10 Jur. N.S. 657, were cited on the argument

The facts of the case, and the questions arising, are fully stated in the following judgment delivered in the Court below.

JONES, J.—“The declaration charges that, in consideration that the plaintiff promised and agreed to introduce and recommend the defendant to the patients and practice of the intestate, late a surgeon and physician, and to relinquish and give up the same to him, in so far as she could do so, the defendant promised to pay the plaintiff, as administratrix, \$200 per annum for three years, payable on the 31st of August, 1864, 1865, 1866. Breach, non-payment of the last instalment of \$200.

The declaration also contains an *indebitatus* count for the sale by plaintiff, as administratrix, to the defendant, of the good-will of the business of the intestate, as a surgeon and physician.

The defendant pleads to the first count, that the agreement of the defendant therein mentioned was made upon the consideration that the plaintiff promised to demise to defendant the premises and residence of the intestate at the yearly rent of \$100 for the term of three years from the 31st of August, 1863, and to introduce and recommend the defendant to the patients and practice of the intestate, and to relinquish and give up the same to the defendant; and the said consideration and promise of the plaintiff was part of the agreement in the first count mentioned. And the defendant avers that when the said agreement was made the plaintiff was not administratrix of the goods, &c., of the intestate, and was not the owner of any estate in the premises so agreed to be demised : that the said agreement was made before the 31st of August, 1863; that the said agreement was and is a contract concerning an interest in lands, and was not in writing, &c., nor was the said agreement to be performed within one year from the making thereof. The defendant pleads to the *indebitatus* count, never indebted.

At the trial it was conceded by the plaintiff that the agreement was made before the 31st of August, 1863.

At the close of the plaintiff's case the defendant's counsel asked for a non-suit, on the following grounds:

That the defendant's plea had been proved: that it was proved that at the time the agreement was made the plaintiff was not administratrix: that the good-will of a surgeon's business is not assets in the hands of an executor; that the plaintiff's evidence shews that the consideration of the leasing of the premises and the purchase of the business was one, and part being an interest in lands the agreement, not being in writing, is void under the Statute of Frauds: that if the letters of administration did refer back to make valid the previous acts of the administratrix, they would not legalize the acts of her agent: that the agreement is not to be performed within a year, and is therefore void, not being in writing. I overruled the legal objections, and stated that the question as to whether the plaintiff's evidence established the defendant's plea must be left to the jury. One witness was then examined for the defence.

In charging the jury, I stated the law as laid down in *Christie v. Clark* (16 C. P. 544,) so far as the same applied to the legal questions raised in this suit. I ruled that the letters of administration having reference back to legalize the act of the administratrix, equally made valid what she did by her agent. I left it to the jury to say upon the evidence whether the contract was entire and complete, as set out in the declaration, or was the leasing of the house a part of the consideration for the purchase of the good-will of the business; if the contract was as set out in the declaration, then their verdict should be for the plaintiff, but if the leasing of the house was a part of the consideration for the contract, then the plea was proved, and their verdict should be for the defendant.

The defendant's counsel stated that he took the same objections to my charge as he had taken at the close of the plaintiff's case. The jury found a verdict for the plaintiff for the amount claimed.

I have felt it necessary to state thus particularly what took place at the trial, because it was contended by the

plaintiff's counsel on the argument of the rule *nisi* that some of the objections, as stated in the rule of the defendant, were not so taken at the trial.

As several of the legal questions that arise in this suit were considered and determined in the case of *Christie v. Clark, supra*, I shall not further consider them here, for although that case has been carried to the Court of Appeal, and has not yet been decided by that Court, yet while the judgment is unreversed it is an authority that is binding on this Court (a). I would observe, however, that the pleadings in the present suit are quite different from those in the case in the Common Pleas. There the declaration treated the lease of the premises and the sale of the good-will of the business as one agreement, and the Court declined to express an opinion, as the objection was not taken at the trial, whether, as this was partly an interest in lands, it would not avoid the contract, under the Statute of Frauds. But in the present case this question does not arise, as the declaration sets out the contract simply as a sale of the good-will of the business, the defendant's plea raising the issue that the leasing of the premises was a part of the same contract, and the jury by their verdict find upon the evidence that the contract was as set out in the declaration.

The legal questions in the present case that were decided in the former action are: 1st, that the good-will of the business, as set out in the first count of the declaration, is assets in the hands of the plaintiff, the price having been agreed on for the sale of the same; 2nd, that the letters of administration, though granted to the plaintiff after the making of the contract with the defendant, referred back to and made valid that contract, such contract being for the benefit of the estate; and if this were not so, there is, I think, strong evidence in the present case, from the conduct and acts of the parties after the letters were granted, of ratification of the previous agreement. I think, also, it makes no difference that the plea in the present action

(a) The case has not yet been argued in Appeal.

expressly raises the issue that the plaintiff was not administratrix at the time of making the contract with the defendant. The same question was raised in the former action, and the Court in giving judgment in that case treated this as one of the points in issue. 3rd. The objection that the contract was not to be performed within a year was also decided in favor of the plaintiff in that action, the Court holding that as the plaintiff's part of the agreement was to be, and in fact was performed within the year, it was not necessary that the contract should be in writing. In addition to the authorities there cited on this point, I would refer to the last edition of *Smith's Mercantile Law*, p. 490; *Roscoe's N. P. Ev.*, 11th ed., 1866, pp. 153, 283; and to *Reuss v. Picksley* (L. R. I. Ex. 342,) decided in the Exchequer Chamber, confirming *Warren v. Wellington* (3 Drew. 523), and *Smith v. Neale* (2 C. B. N. S. 67.)

I feel no doubt that if, as has been decided, the letters of administration refer back to make valid the previous act or contract of the administratrix, it would equally apply to the act of her agent. It is a legal maxim that what I do by another I do by myself; besides, in the present case, the evidence shows that the agent was specially authorized to do what he did, and his acts were at once confirmed and adopted by the plaintiff, and were afterwards acted on both by the plaintiff and the defendant.

The only other question remaining is the objection that the evidence shewed that the leasing of the house was a part of the contract declared on, and that it was therefore void, not being in writing; and the same question is stated in the objection that the verdict is against the evidence."

His Honor here reviewed the evidence, stating that in his opinion it supported the verdict, which was consistent with right and justice.

The rule was therefore discharged.

The defendant appealed from this judgment, on the following grounds:—1. The evidence shows that the plaintiff was not administratrix at the time the alleged agreement was made, and so the contract, if binding at

all, was made with her individually, and should have been so sued on.

2. The good-will of a medical man's practice is not part of the assets of his estate.

3. The evidence shewed the agreement was not to be carried out within the year, and so it should have been in writing.

4. The evidence shewed that the renting of the intestate's house was part of the agreement, and being for an interest in land should have been in writing.

M. C. Cameron, Q.C., for the appellant.

E. B. Wood, contra.

HAGARTY, J., delivered the judgment of the Court.

The questions presented in this appeal are, 1st. Whether the plaintiff below can maintain the action as administratrix, on a contract made prior to the grant of administration; 2nd. Whether the good will of intestate's business was assets; 3rd. Whether the contract being not to be performed within the year required to be proved by writing. The fourth point, on the evidence, was properly abandoned.

The learned Judge below directed the jury in accordance with the law of the case between the same parties on the same contract, in 16 C. P. 544. We should, of course, follow that case without discussion, if this were not an appeal, in which our judgment is final. We have therefore examined the authorities.

We think the first point, as to the grant relating back to the death of the intestate, was properly decided in the plaintiff's favour, and that such is clearly the law.

There is not much direct authority on the second point. It would seem that although the plaintiff was not bound to sell the good-will of her late husband's professional business, yet that if she did so the proceeds would be assets for which she must account. The high authority of Knight Bruce, V. C., in *Smale v. Graves* (3 DeGex. & Sm. 706, A.D., 1850), is in favour of this view. It was a peculiar case,

and he reversed the Master's decision, that the proceeds were not assets as against creditors. He seemed to think that there might be an allowance of the proceeds there to the widow and administratrix as against the creditors. This case is mentioned without disapprobation in the 1867 edition of Williams on Executors. It is not suggested that there is any case in point since 1850. A *Nisi Prius* decision of Lord Kenyon, in *Peake*, is noticed in the last cited case, as to the proceeds of sale of the good-will of a trader's business being assets.—*Worral v. Hand* (Peake, 74.) We think this point must be decided against the appellant.

As to the Statute of Frauds, we think it may be reasonably inferred from the evidence that all the vendor's part of the bargain was to be performed within the year. We should not strain the evidence to defeat her claim. If this be so the cases seem decisive in her favour, that the Statute does not apply.

Appeal dismissed, with costs.

STEWART V. SCOTT.

Admission by pleading—Evidence.

In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty.

Held, reversing the judgment of the County Court, that no inference could be drawn from this as an admission by the defendant of his liability for the plaintiff's wages.

Held, also, affirming the judgment below,—1. That the statements made by L. & M., under the circumstances set out in the case, were properly received.

2. That it was allowable to prove by persons working with the plaintiff that they had been paid by the defendant on application to him, and that in suits brought by them against him he had paid money into Court; and that the judgments in such suits were also admissible, though unnecessary.
3. That a memorandum in defendant's writing, unsigned, and attached to a bill of sale relating to the timber, was also admissible.

APPEAL from the County Court of the County of Peterborough.

Action upon the common counts. *Pleas*, never indebted, payment, and set-off.

The plaintiff's claim was for work from the 18th of December, 1862, to the 29th of April, 1863, at \$10 a month, as a lumberman—\$43.67.

Defendant's particulars of set-off were for goods purchased at shanty, \$25.00, and five and three-quarter days' board, \$3.45—\$28.55; but the real dispute was as to defendant's liability, it being contended that one Leaper, by whom the plaintiff had been directly employed, was the only person responsible.

Much evidence was given on this point, which it is unnecessary to report. Mr. Dennistoun, a solicitor, stated that moneys had been paid through his office into Court on the defendant's account, to men who had sued for wages on account of this timber, though defendant always protested against his liability. Another witness, one Robinson, swore he had an account against Leaper for goods furnished to the shanty, which was paid by defendant's acceptance, and that in an action brought against the defendant by one Hazelton for wages, the defendant put in as set-off a portion of those goods. It was shewn also that defendant had been at the shanty giving instructions; and that the timber was marked with his initials. Goods for the use of the shanty were kept in a chest called the *Vent Lotterie*, and it was from this the goods were received by the plaintiff, which defendant desired to set off. One Martin was the paymaster at the shanty, and by his orders the timber was thus marked. Leaper, when asked for money by Barr, one of the witnesses and a man employed at the shanty, referred him to Martin, and Martin said defendant was the man who paid. There was other evidence given to prove Martin's agency for the defendant.

There was a bill of sale put in from Leaper to defendant, produced from the office of the Clerk of the County Court, attached to which was a written authority to Martin to take the statutory oath in order to file such bill, and on the other side of this authority was a memorandum, proved to be in defendant's hand-writing, but not signed, and containing certain directions. This was objected to on the part of

the defendant, as being inadmissible, but was allowed to be read. The memorandum was, apparently, the second page of a letter written by the defendant, to whom did not appear on it, speaking of certain due bills for the balance of wages, expressing surprise that Leaper's chattel mortgage had not been renewed by his (defendant's) agent, and asking the person written to to advise with the agent and have the old and new timber property made over to defendant, "with as much of his chattels as can be had," and stating the amount of his (defendant's) old account, and of "this year's" advances.

One Gridley swore that he got things from the *Vent Lotterie* while at the shanty, which defendant deducted from his claim when he sued him and recovered the balance. Judgment rolls were received in evidence in the cases of Gridley, Hazelton, and Trudeau, against this defendant, being the suits referred to in the evidence of those witnesses, the defendant objecting to their reception on the ground that they were put in to shew the pleadings in those suits, which could not affect this case.

The learned Judge left it to the jury to say, upon all the evidence, whether defendant was liable, as having through his agents employed the plaintiff; telling them in the course of his charge that the defendant claimed credit in his plea of set-off for articles obtained by the plaintiff from the *Vent Lotterie*, and they might therefore infer that he thereby adopted responsibility for the plaintiff's wages. This charge was objected to, and the jury found for the plaintiff, \$51.43.

The defendant obtained a rule *nisi* for a nonsuit, on the ground that there was no evidence to render the defendant liable; or for a new trial, for the reception of improper evidence, and for misdirection. This rule after argument was discharged, and the defendant appealed.

The grounds of appeal were, that a nonsuit should have been ordered; that the statements of Martin and Leaper, and evidence of the pleadings or judgments in other cases, and of the acts of defendant in reference thereto, and the

memorandum, were improperly received; and that there was misdirection in telling the jury that they might read the plea of set-off as an admission of privity between the plaintiff and the defendant.

C. S. Patterson, for the appellant.

S. Richards, Q. C., contra, cited *Dundas v. Johnston*, 24 U. C. R. 547.

HAGARTY, J., delivered the judgment of the Court.

We think there was legal evidence submitted to the jury in this case, on which we cannot in appeal hold that their verdict for the plaintiff may not be sustained.

The question was one of common occurrence, an attempt to make the defendant liable for the timber got out by other persons, by whom plaintiff was hired to work. On the whole case there was evidence on which the liability of the defendant might be fairly left to the jury, whether the defendant directly or indirectly through his agents engaged the plaintiff to work for him, or on work substantially his own. There are many cases in which the credit is originally given to the agent, he being the ostensible master or owner of the business; when the real owner or principal is discovered he may be made liable, unless it can be shewn that the plaintiff elected to give credit to the person actually engaging his services.

We do not think that the objection urged against receiving the statements of Leaper and Martin should avoid this verdict, having regard to what the statements were, and the foundation laid for them.

It was allowable to prove by persons working at the same business with the plaintiff that they had applied to the defendant for payment, and that he had paid them, or made any statements respecting their claims which could throw any light on his responsibility for the business.

But we cannot agree with the learned Judge's view as to the effect of defendant's pleading a set-off or payment in this or any other action.

A man is charged with being the real principal in a business carried on apparently in the name of another; workmen employed in that business get goods or money from time to time on account of their wages. When they claim payment of these wages from a person who denies all interest in or responsibility for the business, the latter has an undoubted right, in addition to his denial, to urge that even if held liable, the plaintiff's claims should be reduced by whatever moneys or goods he had received on account, and no inference whatever should be drawn unfavorable to the defendant from his having urged any such offset.

We find that the jury were told that as defendant claimed credit for the goods obtained by the plaintiff from the shanty store, they might infer that defendant accepted his responsibility for the wages of the plaintiff. And in his judgment in refusing the new trial this view is strongly urged, and evidently weighed much in his Honor's mind.

We are compelled to allow the appeal on this ground, as such a direction may have wholly misled the jury.

If counsel had urged an argument to them against this defendant, based on his having pleaded or proved set-off or payment, they should have been told most distinctly that no inference whatever adverse to the defendant was legally deducible therefrom.

In a case like this, such direction as was actually given would probably be fatal to the defendant.

Exemplifications of the judgments obtained against this defendant by the witnesses Cameron, Trudeau, and Gridley, were, after objection, received in evidence. In each there was a plea of payment into Court of part of the demand, with never indebted, and set-off, and payment to residue. It was quite unnecessary, after proving the facts of these payments and defences by Mr. Dennistoun, to attempt to prove them by matter of record. We cannot say that on a trial of defendant's liability for the wages of this plaintiff, depending on his being the principal in this timber business, other workmen employed with the plaintiff might not be called to prove that the defendant had recog-

nised his liability to them by paying their claims either in whole or in part. Payment into Court is of course an admission to a certain extent of liability. It is always open to defendant, or his counsel, to explain that he made the payments to save expenses, or to buy peace, or protesting against his liability. But we think the evidence was admissible, and that the appeal, if depending on that alone, could not be sustained.

As to the reception of the evidence of the paper writing or memorandum, we think it was admissible, subject to any comment or explanations which could be offered. It was proved to be in defendant's writing, and would stand on the same footing as if he were proved to have spoken the words written on the paper. It could not be rejected, but was receivable for whatever it was worth.

It may be that the jury might have found the same verdict on the evidence properly before them, and with a proper direction. We, however, must direct that the appeal be allowed, and the rule for a new trial without costs in the Court below be made absolute.

Appeal allowed.

PHILLIPS V. FINDLAY.

Seizure under fi. fa.—Trespass—Evidence to connect defendant.

Held, following Kennedy v. Patterson, 22 U. C. R. 556, that accepting and contesting an interpleader issue could not make an execution creditor a trespasser by relation, or liable for the original seizure.

Where either the execution plaintiff or his attorney direct the seizure of particular goods they are liable, but not where the writ is given to the officer to be acted upon in the usual course, and with no special direction.

The unnecessary length of the appeal books in this case remarked upon.

APPEAL from the County Court of Bruce.

The plaintiff, Thomas Phillips, sued defendant Findlay for trespass and conversion of goods. Pleas, denying the taking and the property.

It appeared that Findlay recovered judgment in the Division Court against John Phillips. Execution was issued, and the bailiff seized and sold a yoke of oxen in the possession of and claimed by Thomas, the now plaintiff. The execution was sued out by a Mr. Browne, acting as attorney for defendant, who lived at a distance. No direction of any kind appeared to have been given to the bailiff.

After the seizure the present plaintiff, Thomas, claimed the goods, and the bailiff applied for an interpleader, which was awarded. Notice of this was sent to the execution plaintiff. In answer a letter to the Division Court Clerk was received from him, saying that he knew nothing of the seizure or interpleader, and that he had originally instructed Mr. Browne and his partner to request the Division Court Clerk to attend to the collection of this claim against John Phillips, with other claims which he, Findlay, held as assignee of one McLean, and asking for a statement of the facts to be procured from the bailiff, &c. It appeared that Mr. Paterson attended on behalf of Mr. Browne on the hearing of the interpleader, and the present plaintiff's claim to the goods was allowed.

The learned Judge of the County Court told the jury that the plaintiff's right to the goods was decided by the interpleader issue: that if they believed the evidence, Browne in issuing the execution and afterwards acted as Findlay's agent and attorney: that notice to his attorney of the interpleader proceedings was sufficient; and if they found that he had notice, and appeared, and contested the claimant's right at the interpleader issue, then defendant Findlay should be held liable.

The jury found for the plaintiff, and a rule *nisi* for a new trial for misdirection having been discharged after argument, the plaintiff appealed.

Robert A. Harrison, for the appellant, cited *Wilson v. Tumman*, 6 M. & G. 243; *Woollen v. Wright*, 1 H. & C. 554; *Walker v. Olding*, *Ib.* 632, *King v. Macdonald*, 15 C. P. 397; *Kennedy v. Patterson*, 22 U. C. R. 556.

S. Richards, Q.C., contra, cited *Slaght v. West*, 25 U. C. R. 391.

HAGARTY, J., delivered the judgment of the Court.

It has been decided that if either the execution plaintiff or his attorney direct the Sheriff or bailiff to seize any particular goods, the plaintiff is liable for the act of the Sheriff or bailiff, at the suit of a third person whose goods they really are. But we find no case in which where no direction of any kind is given, and the writ is given to the officer to be acted on in the usual course, if he seize another person's goods the latter has any remedy against the execution plaintiff. The latter is clearly liable if his attorney give such a direction as causes the mistake. See *Wilson v. Tumman*, (6 M. & Gr. 242), and *Jarmain v. Hooper* (Ib. 827).

The learned Judge below considered that in any event the execution plaintiff's appearance at the interpleader, and opposition there to the present plaintiff's claim, was a ratification of the wrongful act of the bailiff, which made him liable.

Walker v. Olding (1 H. & C. 632), *Woollen v. Wright* (Ib. 554), decided in 1862, followed by *Kennedy v. Patterson* in this Court, in 1863, (22 U. C. R. 560), are express authorities that the execution creditor becoming a party to an interpleader proceeding does not make him a trespasser by relation or liable for the original seizure.

We therefore think that the case wholly fails against the present defendant, and that the rule for a new trial in the Court below should be made absolute without costs.

We feel compelled to remark in this case, as we have had to do before, on the very serious expense inflicted on suitors by the absurd length to which appeal books are spun out by the insertion of documents wholly unnecessary to the decision of the case. Here the whole of the Division Court proceedings, summons, particulars, notices, warrant to bailiff, appraisement, oaths of service, interpleader proceedings, and every other document is set forth at length.

We hope the Court can apply some remedy in the taxation of costs.

Appeal allowed.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—SMITH CORBYN BLANCHARD DEAN, THOMAS WHITEFORD THOMPSON, GILBERT WELLINGTON OSTROM, FRANCIS EDWIN KILVERT, JOHN NETTERVILLE BLAKE, FRANCIS HOLMESTED, JAMES FISHER, WILLIAM RUTHERFORD BAIN, CHARLES SCOTT GIVINS, RICHARD HONEYMAN MUNRO, THOMAS DIXON, HORACE THORNE, DAVID HIRAM PRESTON, PETER MCCARTHY.

In Easter Vacation The Honorable JOHN SANDFIELD MACDONALD was appointed Attorney General for the Province of Ontario, constituted under The *British North America Act*, 1867, 30 Vic. ch. 3.

DONALD BETHUNE (Port Hope), CLARKE GAMBLE, PHILIP LOW, The Honorable ADAM JOHNSTON FERGUSON BLAIR, JOHN CRAWFORD, JOHN B. LEWIS, RICHARD MILLER, ROBERT G. DALTON, RICHARD W. SCOTT, ROBERT DENNIS-TOUN, JOHN BELL, and JOHN D. ARMOUR (Cobourg), were appointed her Majesty's Counsel.

MICHAELMAS TERM, 31 VICTORIA, 1867.

(November 18th to December 7th.)

Present :

THE HON. WILLIAM HENRY DRAPER, C.B., C.J.

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

McMULLEN v. MACDONELL.

Licenses to cut timber—C. S. C. ch. 23.

A license to cut timber, under Consol. Stat. C. ch. 23, has by the Statute the effect of a grant of the timber cut, and though not under seal it is not revoked by the issuing of a patent for the land.

DECLARATION.—First count *qu. cl. fr.*, known as lot No. 18, in the 8th concession of South Algoma, and lots 18 and 19 in the 9th concession of same township, and cut timber, &c. Second count—Trover, for timber, &c.

Pleas. 1. Not guilty. 2. To the first count, land and trees not the plaintiff's.

The case was tried at Pembroke, in September last, before Hagarty, J.

It appeared that by letters patent, dated the 28th of November, 1866, the Crown granted Lot 18, in the 8th concession of South Algoma, to James Fleming, in fee, and that by deed poll, dated 18th October, 1866, James Fleming, in consideration of the payment by the plaintiff to the Crown of all the purchase money due on this lot, granted, sold and assigned, to the plaintiff, his heirs and assigns, the pine trees and timber on that lot, with power to enter and

do all necessary acts in cutting, manufacturing, and carrying away the trees and timber. And by letters patent, dated 17th December, 1866, the Crown granted lots numbers 18 and 19 in the 9th concession of South Algoma to John Fleming, in fee, and he made a similar sale and assignment of the pine trees and timber growing thereon.

Proof was given that the plaintiff cut timber on these lands, which the defendant took away.

The defence was a license under the hand of Mr. Russell, the Crown timber agent, and Inspector of timber licenses, dated 11th August, 1866, purporting to be "By authority of the Consolidated Statutes of Canada, ch. 23, and regulations dated 13th June, 1866, and for and in consideration of the payments made and to be made to Her Majesty." By this instrument, Mr. Russell gave to David Douglass Young and Alfred T. A. Knight, and their agents and workmen, full power and license to cut red and white pine, and all other timber and saw-logs, on a location particularly described, and which included the whole of lot No. 18, in the 8th concession, about two thirds of lot No. 18, in the 9th concession, and a small part of the S. E. corner of lot No. 19, in the 9th concession, of South Algoma, from the date to the 30th of April then next, and which contained this clause: "And by virtue of this license the said licentiate has right by the said Provincial Statute to all timber cut by others, during the term of this license, in trespass on the ground hereby assigned, with full power to seize and recover the same anywhere within this Province aforesaid." The defendant acted under authority of this license in cutting and taking timber which was on the lots mentioned in the declaration.

The plaintiff shewed no right under or dealing for the land in question with the Crown Land Department, prior to the date of the two patents put in.

The learned Judge ruled that up to the date of the patents the licenses prevailed, although on lot 18 in the 8th concession there had been improvements made but no buildings erected, and there were both building and

improvements on No. 19, 9th concession. Under his direction, the jury found for the plaintiff the value of the timber cut and taken since the date of the patent, and he reserved leave to the defendant to move to enter a verdict for him, or a non-suit, if the license gave him right and authority, notwithstanding the grants from the Crown.

S. Richards, Q.C., obtained a rule calling upon the plaintiff to shew cause why a verdict for the defendant or a non-suit should not be entered, pursuant to leave reserved, on the ground that the license proved at the trial prevailed over the patent, and that the plaintiff shewed no right to the land, trees and underwood, as against the defendant.

C. Robinson, Q.C., shewed cause, citing *Wood v. Lead-bitter*, 13 M. & W. 845; *Farquharson v. Knight*, 25 U. C. R. 413.

Anderson supported the rule.

The Statutes cited are referred to in the judgment.

DRAPER, C.J., delivered the judgment of the Court.

The Statute under the authority whereof this license purports to be issued, (Consol. Stat. C. ch. 23,) enables the Commissioner of Crown Lands, or any officer or agent under him authorized to that effect, to grant licenses to cut timber on the ungranted lands of the Crown, at such rates, and subject to such conditions, &c., as may be from time to time established by the Governor in Council, and of which notice shall be given in the *Canada Gazette*. Sec. 1.

No license is to be granted for a longer period than twelve months from date. If from any cause a license is found to comprise lands included in a license of a prior date, the last shall be void so far as it interferes with the previous one. Sec. 2.

The licenses shall describe the lands on which timber may be cut, and shall confer for the time being the right to take and keep exclusive possession of the lands so described, subject to established regulations and restrictions. "And such licenses shall vest in the holders thereof all

rights of property whatsoever in all trees, timber and lumber, cut within the limits of the license during the term thereof," whether cut by the holder of the license, or by any other person, with or without his consent, and shall entitle the holders thereof to seize such trees, &c., where the same are found in the possession of any unauthorized person, to institute actions against wrongful possessors or trespassers, and to prosecute all trespassers and other offenders to punishment, and to recover damages if any.

Mr. Russell stated the license was made in pursuance of an Order in Council of 1851, since when he has issued these licenses, and his acts have been recognized by the Government.

The question then is, whether the grants from the Crown under the great seal of Canada operate to revoke the license.

There has been no question as to Mr. Russell's authority, or that this license was not in conformity with the Order in Council of 1851. But it was argued for the plaintiff that this was not a license irrevocable, because it was not coupled with a valid grant: that a license to cut timber should be by deed, for this was growing timber, and the property of the Crown in it would not, any more than the right to the land itself, pass without a grant, and that as there was no such grant the license was revocable, and was revoked by the subsequent letters patent. Reference was also made to the 16th sec. of the Act respecting the sale and management of public lands, (23 Vict. ch. 2) as shewing that the Legislature thought that a license of occupation would override a license to cut timber, and specially to the last part of the section, which declares that the license of occupation shall have no force against a license to cut timber existing at the time of the issuing the other license. And it was further argued that the provision contained in the timber license,—“that persons settling under lawful authority or title within the location hereby licensed, shall not in any way be interrupted in clearing and cultivation” by the licensee, or any one acting under him,—was in favor of that construction.

We rather consider the last part of this section as inserted *pro majore cautelâ*, as if the Legislature, fully recognizing the effect of a prior license to cut timber, desired to leave no opening for question as to the effect of a subsequent license of occupation. The reservation in the timber license is especially limited to the protection of lawful settlers in their clearing and cultivation.

The Public Lands Act, (23 Vic. ch. 2) so far indicates the nature of the license of occupation as to require it to be under the hand and seal of the Commissioner of Crown Lands. The Crown Timber Act simply enables that officer, or any officer or agent under him, authorized to that effect, to grant licenses to cut. This is the creation of a power—a very different instrument from one ordinarily required to operate as a grant of real property vested in the Crown. The Crown Timber Act requires that the license shall describe the lands upon which the timber may be cut, and declares what the effect of the license shall be. For that special purpose—of selling Crown timber and vesting all the necessary right and authority in the purchaser to cut and take it, and to reclaim the timber if taken away by and in the possession of any unauthorized person—the Statute authorizes a particular instrument, giving to it certain specified effects, and intending it as a substitute for those modes of conveyance which must otherwise have been resorted to. It may be safely conceded that without the Statute a license unsealed to cut Crown timber would be inoperative, because the defendant has the right under a form which the Legislature has declared shall be effectual. We do not rest our conclusion on any common law doctrine as to what licenses are or are not revocable, or by what sort of instrument they must be granted in order to be effectual. We think the Statute puts all that wholly out of the question.

We do not think that the words of the Statute make it necessary that the license should be under seal. It could not very well be under any official seal, since the power given to the Commissioner of Crown Lands may be delegated by him to any of his officers or agents, the latter, as we know, resident in various parts of the Province, and

they could not all have the official seal, if there is one. But the power to grant licenses of occupation was conferred on the Commissioner alone, without any power of delegation, and to be exercised by him under his hand and seal. We think this difference between the two acts must be considered as intentional.

We intimated this view of the act respecting the sale of Crown timber in *Farquharson v. Knight*, (25 U. C. R. 413.) We have considered it more fully in the present case. The result is that in our judgment the rule to enter a verdict for the defendant should be made absolute.

Rule absolute.

THE ROYAL CANADIAN BANK V. ALEXANDER BROWN AND
THOMAS FRISBY.

Evidence—Comparison of writings—Practice.

When collateral issues arise out of comparison of hand-writing, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it.

Plaintiff sued as indorsee of a promissory note. A witness for defence said he thought the signature of the indorser not genuine. On cross-examination he was asked whether two signatures on a paper shewn to him were the indorser's, and he said he thought not. In reply the plaintiff proved that they were, defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case.

Held, that being admissible for one purpose, it was evidence generally in the cause, and should have been so left to the jury.

THE declaration was upon a promissory note, dated 30th March, 1867, made by Henry Brown, payable to defendant Alexander Brown, or order, two months after date, for \$800, and endorsed by him to defendant Frisby, who endorsed to the plaintiffs.

Each defendant denied having endorsed.

The case was tried at the Assizes for the County of York, in October last, before Adam Wilson, J.

The plaintiffs called several witnesses to prove the signatures of the two defendants. As to the defendant Frisby, they failed, and took a nonsuit, but as to the defendant Alexander Brown they gave sufficient evidence to go to the jury. In the course of this evidence it appeared that Henry Brown had recently absconded: that the defendant Alexander had been called upon in regard to other notes to which his name was signed as maker or endorser, and had denied his signature. As to one of these so denied, a witness swore she saw him sign it; and another or others had been paid, though not by him for any thing that appeared. Henry and Alexander were brothers, and the former had been concerned in a mill.

On the defence a witness was called, who stated that he had seen defendant Alexander sign his name once within two years, and that in his opinion the endorsement "Alexander Brown" on the note was not his signature. Frisby, the other defendant, was also called and sworn, and was held to be a competent witness, but questions were put to him which were objected to, and the objection was sustained. Another witness was called, who proved that on a paper put in (marked A) the defendant Alexander Brown had twice signed his name, and that the same name signed on the opposite side of the same piece of paper was written by another person. One of the witnesses for the plaintiff had been shewn this paper, and asked as to the signatures on it, and said he could not tell whether they were the defendant Alexander's writing or not, but they did not look like that on the note which Alexander had signed for him (the witness).

In reply, the President of the plaintiffs' Bank produced a piece of paper (marked No. 2) on which the said Alexander Brown had signed his name in his (the witness's) presence. The defendant's counsel objected that this should have formed part of the proof to support the original case. The learned Judge admitted it, because this paper had been shewn to the first witness for the defence, who had stated that he should say the signatures were not the genuine signatures of the defendant Alexander.

The learned Judge left the case to the jury, with observations on the testimony of the various witnesses. He left the paper (No. 2) to the jury only for the purpose of discrediting the testimony of the defendants' first witness.

The plaintiffs' counsel took objections to the charge.

The jury found for the defendant Alexander Brown.

In Michaelmas Term *James Paterson* obtained a rule calling upon the defendant Brown to shew cause why there should not be a new trial, the verdict being contrary to law and evidence, and for misdirection, in not submitting to the jury the paper marked No. 2, as evidence upon which to found a comparison with the signature in dispute; and that there was some evidence, which ought to have been submitted to the jury, that the defendant Alexander had assented to his name being used by his brother, the maker of the note; and for the improper reception of the evidence of the defendant Frisby.

McMichael shewed cause.

James Paterson supported the rule, citing *Doe dem Perry v. Newton*, 5 A. & E. 514; *Griffits v. Ivery*, 11 A. & E. 322; *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24.

DRAPER, C. J., delivered the judgment of the Court.

The plaintiffs sue as endorsers and holders of the promissory note in question, and from what appears it may safely be assumed that they took this note from and discounted it for the maker, Henry Brown.

As a general rule, a valid transfer of a promissory note can be made only by the payee, or other person who has acquired a legal interest in the note, or by his agent. Treating a promissory note as a *chose in action* made assignable by the Statute of Anne, so that the assignee can sue in his own name upon it, it would be difficult to hold that Henry Brown, the maker, had a right of action upon it, and if he had none he could make no valid transfer of it. The plaintiffs could only derive a title by delivery

from him, on the assumption that the endorsers, or the last endorser, had made him their agent to procure the discount. As the transaction appears, the plaintiffs must be deemed to have known it was merely endorsed for the maker's accommodation, and to have relied upon his representation of the endorsers' signatures. They could scarcely have looked upon it as founded upon an actual business transaction.

Such a course of dealing in the discount of promissory notes has however been followed perhaps as long as we have had Banks, and has been so long recognised, tacitly at least, by the Courts, that we should not have adverted to it, but for the fact that it was observed upon in the course of the argument. No question is presented which arises from this mode of transacting banking business.

We think, after going carefully through the report of the trial, that the evidence in favour of the plaintiffs preponderated, and we should have been better satisfied with a verdict in their favour.

There is, however, a question as to misdirection, which should be first disposed of. A witness was called for the defence, who expressed his opinion that the alleged endorsement by Alexander Brown was not genuine. On the cross-examination a paper was shewn to him, and he was asked whether two signatures thereon were the signatures of Brown, and he said he thought they were not. In reply the plaintiffs proved that Alexander Brown had written these signatures when the endorsement on the note was disputed by him at the Bank. The learned Judge admitted this evidence for the purpose of impeaching the witness for the defence, but would not let the paper go to the jury to sustain the plaintiffs' case by comparison with the disputed endorsement.

The broad principle is well established, that where there is only one issue, the *onus* of proving which lies on the plaintiff, he must advance all his evidence in the first instance, and cannot rely on proof of a *prima facie* case, and after that has been shaken by the defendants' proof, call

other evidence to confirm it. Here the evidence was properly offered and received to weaken the force of a material part of the defendants' proof, and, being so admitted, the question is, does it become evidence for all purposes of the cause?

We have seen no case upon this point. The issue was, whether the defendant endorsed the note in suit? Frisby, the defendant's witness, after stating his knowledge of the defendant's hand-writing, expressed his opinion that the endorsement was not defendant's signature. A paper was shewn to him—not then proved to be genuine, and certainly not direct evidence on the issue, for nothing but the defendant's name was written on it twice—and he was asked if he thought the writing was the defendant's, and he said he thought not. Afterwards the evidence in reply was received, after objection made and overruled that this was evidence to support the issue which was on the plaintiffs, and therefore could not be given in reply. We think the objection was properly overruled. But then the jury had to form their conclusion as to the value of Frisby's evidence, and, as appears to us, the paper which he said did not contain the defendant's signature, but which was satisfactorily proved to contain it, should have been submitted to their inspection to enable them to put a right estimate upon his evidence as to the endorsement. If this was, as Mr. Paterson asserts, withheld from them, we are not prepared to uphold the ruling.

Nor have we been able to satisfy ourselves that if this paper was admissible as evidence for any purpose, it was not evidence generally in the cause. The rule that forbids a plaintiff to supply defects in his case by evidence given in reply, seems to rest upon the ground of inconvenience to which a contrary practice would lead, for the defendant must in turn be allowed to meet the new proof, and it seems to us a greater inconvenience would result from submitting to a jury matter as being evidence for one purpose (and that a collateral one, viz., the value of part of the testimony given), and to exclude the same

matter from consideration on the question principally in issue, and on which it has a bearing more or less material.

The admission of comparison of writings must inevitably give rise to collateral issues or inquiries, and if in relation to them evidence becomes admissible at a stage of the cause when it would be otherwise excluded, we think it will be less embarrassing to the jury, and more likely to lead to the attainment of truth, to treat such evidence as applicable to the case generally, wherever it properly applies to it.

On this ground we think the rule should be made absolute, without costs.

Rule absolute.

IN RE GRAND AND THE CORPORATION OF THE TOWN OF GUELPH.

Tavern and saloon licenses—13 & 14 Vic. ch. 65.

Held, that under 13 & 14 Vic. ch. 65, the Municipal Corporations had power to discriminate between the different kinds of public houses, and that they were authorised therefore to charge differently for a saloon and a tavern license, and to require different accommodations.

Palmer, in last Easter Term, obtained a rule calling upon the Corporation to shew cause on the first day of this term, why the sixth clause of by-law No. 65, of the Town of Guelph, passed 3rd December, 1856, should not be quashed, with costs, on the following grounds: 1. That the by-law by the sixth clause attempts to impose a discriminating rate for tavern licenses, which is not authorised by any power conferred on said Corporation by Statute. 2. That the said clause imposes a duty on a saloon license differing from the duty on a tavern license, no such distinction being recognised by the Municipal Acts.

The rule was drawn up on reading the affidavit of the applicant Grand, and a certified copy of the by-law. The applicant stated that from 1860 to the time of the swearing

of the affidavit (3rd June, 1867), he had been the proprietor and keeper of a tavern or house of entertainment in Guelph, for the retail of spirituous, fermented, and other manufactured liquors, to be drunk therein : that during each of the prior years and the present year the Council, on his petition, granted him a license to keep a tavern : that the Council exempted him and other persons, not exceeding in all four in any one year, from the necessity of having all the tavern accommodation required by the Statutes of this Province : that in each of the said years the Treasurer of the town compelled him to pay \$101 for his certificate to enable him to obtain from the Collector of Inland Revenue (on payment to such officer of the Provincial duty, amounting to \$10) a license to keep a tavern as aforesaid : that the Treasurer informed him that \$100 of such charge was made under clause 6 of such by-law, and \$1 under clause 14 of the same.

The by-law itself was entitled, "Taverns and Inspectors," and it recited that it was expedient to make provisions relating to the inspectors and houses of entertainment. The second and third clauses declared what accommodations every inn and tavern keeper should at all times provide for guests, and for stabling for horses, hay, oats, &c. By the fifth clause every person to whom an inn or tavern license shall be granted, shall pay to the treasurer £10, in addition to the imperial tax, and to keep a temperance hotel shall pay £6 ; and then by the sixth clause, the one referred to in this rule, it was provided that every person who should obtain a license to keep a saloon should pay to the treasurer £25, and should be subject to all the conditions and regulations contained in the same by-law relating to inn and tavern keepers, except so far as stabling, oats, hay, bedding, and bed-rooms, were concerned ; and that all saloons should be closed at or before eleven o'clock each night, and during the whole of the Sabbath.

During this term *J. H. Cameron*, Q. C., shewed cause.

He filed in answer the affidavit of *James Hough*, the

Town Clerk and Treasurer of the Corporation, which stated that the by-law in question, before the final passing thereof on the 3rd of December, 1856, was duly approved by a large majority of the electors of the Town of Guelph, in manner provided by the municipal law: that before and since the passing of it there were and have been, and there are now, houses of public entertainment in Guelph for the sale of spirituous liquors known as saloons, which houses are the saloons referred to in the sixth clause, and exempt from providing stabling, &c., as therein stated, being special privileges granted to them over ordinary taverns: that for several years past, up to some time in this year, the applicant kept a saloon in Guelph by the name of "The Shades Saloon," and in his yearly application for license to keep such saloon named his house as "The Shades Saloon;" that the Council in granting licenses to the applicant and other saloon keepers, referred to such licenses as saloon licenses, as distinguished from ordinary taverns: that the applicant always sought and obtained his license under the sixth clause, and availed himself of the privileges which that clause gives to saloons: that in June last the applicant sold his property in the said saloon to one Kenet, and the application to transfer the license issued for such saloon was supported by a certificate as to the character of Kenet, which was drawn up by the applicant and signed by him and others, and it referred to the premises in question as "Grand's Saloon."

Palmer supported his rule.

The Statutes referred to are cited in the judgment.

MORRISON, J., delivered the judgment of the Court.

The by-law in question was passed under the provisions of the 13 & 14 Vic. ch. 65, sec. 4, and after the passage of the Act 16 Vic. ch. 184, which enacted, by the fourth clause thereof, that any by-law requiring payment of more than £10 for a license should be approved and adopted by a majority of the municipal electors.

By the fourth section of the 13 & 14 Vic. the Council

of each town had power to make by-laws for limiting the number of inns or houses of public entertainment in towns, for which licenses to retail spirituous liquors to be drunk therein shall be issued, and for fixing the terms and conditions which shall be previously complied with by any person desiring such license, the description of house and accommodation he shall have, &c., and the sum which he shall pay for such license over and above the duty imposed by the Imperial Act 14 Geo. III. ; and to make by-laws for similar purposes, with respect to ale or beer houses, and other houses for the reception and entertainment of the public, where fermented or other manufactured liquors are sold to be drunk therein.

It is obvious that the Legislature intended by these general provisions that the Town Council should have the power of discriminating with respect to houses of entertainment, determining the description of the house and accommodation, the terms and conditions upon which the keepers thereof were to obtain certificates for license, and the sums they should pay the treasurer for every such described class of houses of public entertainment. The Statute itself is entitled An Act relative to Tavern Licenses, and its preamble refers to taverns, beer shops, and houses of public entertainment, and in the enacting clause refers to inns and houses of, &c. Since the passage of that Act the laws relating to licensing such houses in some respects have been changed, and were embodied in the Consolidated Statutes, and lately re-enacted by the Municipal Act of 1866, but all by-laws passed under the various Statutes so consolidated have been saved, and such by-laws remain in force except in so far as they may be inconsistent with the later legislation.

All these Statutes by the use of the general term houses of public entertainment intended to include, besides those specially named, every kind of house in which spirituous liquors were drunk, and in the various Statutes in Upper Canada they are referred to under different classes, *i.e.*, taverns, inns, hotels, ordinaries, and victualling houses, and

public houses; and no doubt these various houses are in many respects differently kept and sustained. We find nothing in any of the Statutes shewing an intention on the part of the Legislature that there should be a uniform duty imposed by the municipality on all such houses, while, on the other hand, the language used implies the placing a discretionary power in the Council, to say what amount shall be paid respectively by the keepers of the different kind of houses, in order to obtain a license, and there are obvious reasons why it should be so.

The license granted to the applicant for the present year would be granted under the 251st section of the Municipal Act of 1866, he paying to the treasurer the amount specified in clause six of the by-law. That 251st section enacts that, "Every tavern licence shall be issued by the Collector of Inland Revenue for the Revenue Division in which the hotel, tavern, house, vessel or place to which the license is to apply shall be situate," and that "the words 'tavern license,' shall mean and include any such license as aforesaid, and no other;" and by the preceding 249th section, sub-sec. 1, tavern license certificates are defined to be "certificates to obtain licenses for the retail of spirituous, fermented, or other manufactured liquors to be drunk in the inn, ale-house, beer-house or any other house or place of public entertainment in which the same is sold;" so that no matter what the house or place may be called, the Collector of Inland Revenue is to issue to the party who produces the proper certificate from the municipality a tavern license.

On the whole, we see nothing to sustain the first objection.

Then as to the second objection, it is somewhat similar to the first. It was pressed on the argument by Mr. Palmer that the term saloon was not known to the law or in the English language, and for that reason the by-law was bad. It is not used in the Statute, and the word saloon in the sense used in the by-law may not be found in a dictionary, yet in common parlance it is used every day, and is well understood to be a house or place in which

spirituous liquors are sold and drunk; and we find a case in this Court, *In re Baxter* and *Hesson et al.* (12 U. C. R. 139), where a mandamus was asked for commanding the inspectors to inspect a house of the applicant fitted up as a saloon, and if found entitled to a certificate of his having complied with a by-law relating to the licensing of saloons passed under the same Statute, 13 & 14 Vic., to grant him such certificate; and although the Court in giving judgment said that the statute law says nothing of saloons, yet the case shews the term was used and understood; and the rule was refused because the Court did not judicially know the qualifications that would fit a person to conduct a saloon well, and would not overrule inspectors, who were by the Legislature made judges of these matters.

It is quite immaterial by what appellation the house or place is known or called, if spirituous liquors, &c., are drunk or consumed in it. The licenses required, although called tavern licenses, are not restricted to houses of any particular denomination, but the language used is intended to cover the sale in any and every house or place, under certain conditions and in a particular manner, of spirituous and other liquors—the intention of the Legislature being three-fold, for revenue purposes, the accommodation of the public, and to prevent houses in which such liquors are sold being under the management of improper persons.

We have not overlooked the 220th section of the Municipal Act of 1866, which precludes the Council from giving to any person an exclusive right of exercising any trade or calling; but this by-law refers to a class of houses of entertainment restricted in number, which the Councils are authorised to license.

We are therefore of opinion that on both grounds the application should be refused, and the rule discharged with costs.

Rule discharged.

IN RE MOFFATT AND THE SHERIFF OF THE COUNTY OF
YORK.*Insolvent—Sale of lands under fi. fa.—Right to proceeds—29 Vic. ch. 18,
sec. 17.*

M., under a *fi. fa.* at his own suit against D., which was the first in the Sheriff's hands, purchased certain land in September, 1867. D. had in April previous made a voluntary assignment, under the Insolvent Act of 1864, to an official assignee, who claimed the proceeds of the sale, under the Amending Act, 29 Vic., ch. 18, sec. 17. M. claimed a conveyance from the Sheriff, crediting the purchase money on his judgment.

The Court, under these circumstances, discharged with costs an application by M. for a mandamus to compel the Sheriff to convey, to which the assignee was no party.

Harrison, Q. C., obtained a rule calling on the Sheriff of the County of York to shew cause why a writ of mandamus should not issue to him, peremptorily commanding him as such Sheriff to make, execute and deliver to the applicant a deed of all the right and title of Robert B. Denison in certain lands particularly mentioned.

It appeared by affidavit in support of the application, that Moffatt, on the 13th of May, 1863, recovered a judgment in this Court against Alexander Shaw and Robert B. Denison for \$1533: that a writ of *fi. fa.* goods thereupon issued, and was returned *nulla bona*: that on the 13th July, 1863, a *fi. fa.* against lands was issued, directed to the said Sheriff, to levy the said moneys, which was renewed on the 11th of July, 1864, 10th of July, 1865, and 7th of July, 1866: that under the last writ the Sheriff seized and levied upon certain lands of Denison, which were advertised for sale: that on the 6th of June, 1867, he returned the writ lands on hand for want of buyers, and on the same day a *ven. ex.* was issued, and on the next day was delivered to the Sheriff: that on the 28th of September, 1867, the lands were sold, and the applicant became the purchaser for \$1310: that this execution was the first in the Sheriff's hands, and there was due on it \$1977.68: that after the sale the applicant paid the Sheriff his fees and disbursements (\$129.68), leaving a balance of the purchase money

of \$1187.32 : that Moffatt afterwards applied to the Sheriff to have a deed of the lands so sold made to him by the Sheriff, and formally demanded it, tendering \$5 to pay for the deed, but the Sheriff declined to execute it, on the alleged ground that the said Robert B. Denison on the 2nd of April last, and previous to the said sale, made a voluntary assignment of his estate and effects to an official assignee under the Insolvent Act of 1864 : that the Sheriff required the applicant to pay to him the balance of the purchase money before he would execute a deed, which the applicant considered he had a right to retain in part satisfaction of his execution.

On shewing cause an affidavit was put in, made by the Deputy Sheriff, stating the sale to have been on the 28th of September, 1867, on a writ of *ven. ex.* received on the 8th of June, 1867 : that the writ of *fi. fa.* against lands, upon the return of which the *ven. ex.* was issued, was first received by the Sheriff on the 13th of July, 1863, and was renewed (as above) : that no actual seizure of the said lands was made under the *fi. fa.*, and no lands were advertised thereunder until the 9th of March, 1867. After stating the voluntary assignment to an official assignee residing in the City of Toronto, wherein the said Robert B. Denison then resided, the Deputy Sheriff swore that the assignee permitted the Sheriff to proceed with the sale, but claimed that the proceeds thereof should be paid to him, under and by virtue of the 17th section of the Act to amend the Insolvent Act of 1864, 29 Vic., ch. 18.

M. C. Cameron, Q. C., shewed cause.

James Paterson supported the rule, citing *Converse v. Michie*, 16 C. P. 167 ; *Whyte v. Treadwell*, 17 C. P. 488 ; *Tapping on Mandamus*, 258.

DRAPER, C. J., delivered the judgment of the Court.

We think this rule must be discharged.

We ought not on this application, to which the official assignee is no party, to decide against his claim, even if we

thought it not perfectly clear. If the applicant has the right which he sets up, he has a remedy over against the Sheriff both for loss and delay, and very possibly if he had tendered a sufficient indemnity to the Sheriff he might have got a deed without this application

We do not overlook the consideration that the official assignee, although bound to give effect to the priority which apparently the applicant has obtained, may have a right to appropriate part of this money when it reaches his hands to pay the costs of the proceedings in insolvency, and to that extent may deprive Moffatt of the fruits of his execution. If so, it is attributable to the voluntary delay of the latter, in not enforcing his execution for a period of three years.

We think the Sheriff is entitled to his costs.

Rule discharged, with costs.

SMITH V. THE ROYAL INSURANCE COMPANY.

Insurance—Alienation—Equitable Replication—Insurable Interest.

Declaration on a policy of insurance on the plaintiff's interest in a mill.

Plea, that before the loss the plaintiff had sold and conveyed his interest in the property to one B., without notice to defendants or their assent. Replication, on equitable grounds, that the conveyance to B. was only to secure him against loss as surety for the plaintiff, who always continued in possession, and no loss had accrued to B.; and that one F. was entitled to the benefit of the plaintiff's covenant to insure, contained in a mortgage of the property made to him by the plaintiff before the conveyance to B., and this action is brought on F.'s behalf as well as the plaintiff's.

Held, on demurrer, a good replication, for it shewed an insurable interest in the plaintiff cognizable in a Court of Law; and the unnecessary statement of F.'s interest could not affect it.

DECLARATION on a policy of insurance for \$2,000, of the "plaintiff's interest (being one-half) in a grist mill," &c. (describing it), by which defendants agreed to pay or make good to the plaintiff all such loss or damage by fire

as should happen to the said property. Averment, that the said property was totally destroyed by fire, to the loss and damage of the plaintiff of upwards of \$2,000 ; and all conditions were fulfilled, &c.

Plea, that after the making of the policy, and before the loss, the plaintiff had sold and conveyed his interest in the property therein mentioned to one Henry Brownlee, and that no notice of such sale and conveyance was given to the defendants by the said Henry Brownlee, or by the plaintiff, before the happening of the loss in the declaration mentioned, nor did the defendants assent to the same.

Replication, on equitable grounds, that the plaintiff did not sell his interest in the said property to Henry Brownlee as in the said plea alleged, and that, although he did execute a conveyance of the said property to the said Henry Brownlee, yet such conveyance was made only for the purpose and by way of securing the said Brownlee against loss which might happen or accrue to him by reason of his having become surety for the payment of moneys by the plaintiff, and there was no other value or consideration for the said conveyance, and the plaintiff continued and was at the happening of the said loss in possession of the said property by his tenant, and was always up to and at the time of the said loss entitled to receive a re-conveyance of the said property from the said Brownlee, upon paying the said moneys, or otherwise relieving the said Brownlee from loss or liability in respect thereof ; and no loss happened or accrued to the said Brownlee by reason of his having become surety as aforesaid. And that, at the time of the said loss, Thomas Brock Fuller was entitled to the benefit of a covenant on the part of the plaintiff, contained in a mortgage of the said property made by plaintiff to him before the making of the said conveyance to the said Brownlee, to insure the said property against loss or damage by fire ; and the plaintiff brings this action as well for the benefit and on behalf of the said Thomas Brock Fuller, as on his, the plaintiff's, own behalf.

Demurrer, on the grounds, that the replication is a departure from the declaration, and that if the plaintiff has

any claim against the defendants, which the defendants deny, it should be made in a Court of Equity and not in a Court of Law, as the replication admits the truth of the plea of the defendants, and in no way answers the matter of the said plea; also, for that the said replication is contradictory, in this, that in the introductory part of the replication the plaintiff states that the conveyance made to the said Henry Brownlee was as a security to him, whereas in the concluding part of the replication it appears that one Thomas Brock Fuller had a prior interest or claim to that of the said Henry Brownlee.

Galt, Q. C., for the demurrer, cited *Jacobs v. Equitable Insurance Company*, 17 U. C. R. 35, 43.

C. S. Patterson, Rae with him, contra, cited *Sadlers' Company v. Badcock*, 2 Atk. 554; *Lynch v. Dalzell*, 4 Bro. P. C. 431; *Pooley v. Harradine*, 7 E. & B. 431; *Sparkes v. Marshall*, 2 Bing. N. C. 767; *Hutchinson v. Wright*, 25 Beav. 444; S. C. 4 Jur. N. S. 749; *Marks v. Hamilton*, 7 Ex. 323; *Heckman v. Isaac*, 6 L. T. Rep. N. S. 383; *Davies v. The Home Insurance Co.*, 24 U. C. R. 364.

HAGARTY, J., delivered the judgment of the Court.

On this record we see no condition restraining alienation by the assured, and we must regard the plea as amounting to a denial of any interest in the plaintiff at the time of loss, as all his interest had passed to Brownlee.

But the replication discloses the true nature of the dealing with Brownlee, and that it was a mere mortgage, leaving an insurable interest in the plaintiff. That such an interest is insurable there can be no question. The law is fully discussed in *Davies v. The Home Insurance Co.*, in the Court of Appeal (a). See also *Richards v. Liverpool and London Insurance Company*, lately before this Court (25 U. C. R. 400).

The difficulty that pressed upon this Court in *Davies' Case*, as to the form of the declaration, does not arise here,

(a) 24 U. C. R. 364; not yet reported in Appeal.

the insurance being on "plaintiff's interest," without further description, in the property insured.

The only doubt we felt in the argument was caused by the unnecessary (for the purposes of this demurrer) introduction of the statement of Fuller's interest; but we think it does not lessen the effect of the full answer given to the statement in the plea as to Brownlee. It merely shews that in addition to the mortgage to Brownlee, there is also a mortgage of some kind or other, not stated, to Fuller.

We think the record shews a good insurable interest properly cognizable in a Court of Law, and that the plaintiff is entitled to judgment.

Judgment for plaintiff.

THE NORTHERN RAILWAY COMPANY OF CANADA V. LISTER.

Particulars—Construction of—Corporation—Ultra vires—Fraud—Estoppel by.

The defendant being employed by the plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service.

The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished, but not for work and labour.

Held, 1. That they could recover under the particulars, for proof of the work expended in the goods was a mode of ascertaining their value, and the defendant could not have been misled.

Particulars are not to be construed with the strictness applicable to a count on a special contract.

2. That defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs, under their charter, could not sue on such a cause of action.

3. The articles thus furnished were charged by the plaintiffs at \$500, which the jury gave, and allowed a doubtful credit of \$180, though such goods could have been obtained at an establishment for the purpose for about \$180; but much time had been expended in experiments and in making tools for the work, not required in the plaintiffs' business. *Held*, that the damages were not excessive.

THE declaration was for goods sold and delivered, goods bargained and sold, work and materials, the common money counts, and upon accounts stated.

Pleas.—1. Never indebted. 2. Payment.

The case was tried at the York Assizes, in October, 1867, before Adam Wilson, J.

The leading facts were as follows: The defendant was for a length of time employed by the plaintiffs as their locomotive and car superintendent. By his directions, given to those who were his subordinates in the plaintiffs' employment, certain quantities of the plaintiffs' iron and steel were used, and workmen in the plaintiffs' blacksmith department were employed, in work for the defendant's benefit, which work, when finished, was taken to an establishment for making sewing machines, in which the defendant was a partner. The materials so taken were accounted for to the plaintiffs as employed in their use, and the men's time was untruly charged as occupied in the plaintiffs' service, and these entries were made under the direction of the defendant.

The value of the materials was much less than the wages of the men employed in working upon or in connection with them. The articles made could, as it appeared, be obtained from establishments for doing that sort of work at a less price than these materials and work amounted to; but it was sworn that much time was employed in experimenting and trying to make an improved sewing machine, and in making tools required for the defendant's work, which were not necessary in the plaintiffs' business. In this way, the articles for which the plaintiffs sought to recover in this action were charged at prices amounting in all to \$500, while had they been bought at such an establishment as above mentioned they could have been purchased at \$180, or thereabouts.

The defendant proved that his partner had made payments to the plaintiffs amounting to \$180 13, for repayment of wages paid by the plaintiffs to their men. The plaintiffs had a corresponding account against one Rogers for that sum, but it did not appear that it covered the work done as above set forth by the defendant's direction.

At the close of the plaintiffs' case the defendant's

counsel objected that the plaintiffs could not succeed, because they had no trading powers, and they were bringing this action for work and labor, &c.: that their particulars were for goods furnished, and they had not shewn any more than that they did work and labour (a).

The learned Judge overruled the objections, and left the case to the jury on the evidence. They found for the plaintiffs, apparently allowing the full sum charged, but deducting the amount paid by defendant's partner.

M. C. Cameron, Q. C., obtained a rule calling on the plaintiffs to shew cause why there should not be a new trial, the verdict being contrary to law and evidence, and for excessive damages, and for misdirection, in telling the jury that the plaintiffs were entitled to recover notwithstanding the work done was not within their powers of incorporation, and they could not as a corporation trade in the sale of goods or in the doing work of the kind claimed for; and in telling the jury that the plaintiffs were entitled to recover for work done, although the particulars annexed to the record and delivered and the evidence shewed that the goods were the defendant's own, with certain work put on them by the plaintiffs. He cited, as to the particulars, *Law v. Thompson*, 15 M. & W. 541; *Morgan v. Harris*, 2 C. & J. 461; *Holland v. Hopkins*, 2 B. & P. 243; *Breckon v. Smith*, 1 A. & E. 488; as to the other point, *Great Western R. W. Co. v. Preston and Berlin R. W. Co.*, 17 U. C. R. 477.

Galt, Q. C., shewed cause.

(a) The following were the particulars of the plaintiffs' claim:

To one Slide Rest, two Sliding Head Stocks (one machine) . . .	\$250 00
“ Table Grip Vice	36 00
“ Screw Prop and Lever, with Steel Vice complete	200 00
To twelve Wheels with cast centres of Steel—Trimming Tools— two Pulleys (16 × 5 face)—four Wrenches from one to one- and-a-half inches—six Head Tools	14 00
	<hr/> \$500 00

DRAPER, C. J., delivered the judgment of the Court.

First, as to the question arising on the particulars. The case of *Mayor v. Ward* (10 Jur. 796), has a strong application. It was an action for work and labour as an architect, and for commission. The particulars claimed a commission of five per cent on the estimated expenditure. It was held the plaintiff might recover for work and labour, although the jury negatived the right to commission. Patteson, J., said, "The particulars do not claim five per cent. commission on the footing of any agreement, so as to confine the plaintiff to any particular contract. If that had been so, it would not be open to the plaintiff to go into a case on the *quantum meruit*. Here the cause of action stated in the declaration is work and labour; and I do not see why the statement in the particulars might not be taken as a mode of estimating the amount." And in refusing a rule for a new trial, Lord Denman, C. J., said, "Although the plaintiff's particulars were for commission, we think they cannot reasonably be considered to bind him to recover that only, and that indeed they could not so bind him, and he ought to be at liberty to shew the value of his services." We think it may be even more forcibly said in the present case, that the plaintiffs ought to be at liberty to shew the value of the articles stated in the particulars by proving the value of the work and materials employed in making them; it is a mode of ascertaining their price. The defendant must have known as fully from these particulars as he would if the additional words "for work, labour, and materials," had preceded the charge on each article mentioned. As has often been observed, particulars are not to be construed with the strictness applicable to a count on a special contract, and if the defendant could not be misled as to the preparation he had to make in order to resist the claim, the plaintiffs should not be defeated. It is manifest the defendant was not misled. See also *Brown v. Hodgson* (4 Taunt. 189).

The objection as to the right and power of the plaintiffs

under their charter of incorporation is of a more serious character. The principle is well established, that a corporation constituted for a particular purpose cannot carry on business of a different character, nor act out of the proper scope of its charter. We have no difficulty in holding that the plaintiffs' charter does not authorize them to carry on a trading or manufacturing business, or to deal in or manufacture for sale articles such as are stated in the particulars. The case of *Hamilton v. The Niagara Harbour and Dock Company* (6 O. S. 381), which I mentioned during the argument, enters fully into this question.

But it is obvious that the plaintiffs do not pretend to possess any such right. They are in fact complaining and seeking compensation from the defendant, because, when in their service, he abused the confidence placed in him, and used their property and employed their workmen in making certain articles for his own use, and which he got possession of. Assume this to be true; can he be heard to say to the plaintiffs, "You shall not recover from me the value of the materials and labour which belonged to you, and of which I am enjoying the products, because your charter does not authorize you to engage in such a business." The answer is that the plaintiffs never intended to become manufacturers or vendors of articles manufactured for the purpose of being sold: that the manufacturing and sale appearing in this case, was not carried on by them as a part of their business; but that they seek to treat the defendant as vendee, and themselves as vendors of articles produced (without their knowledge) but at their expense, which the defendant, without any authority from them, caused to be made for himself, and has taken away; and they urge that he should not be permitted to set up this flagrant breach of duty, if it be no more, as a reason for keeping these goods without paying for them. We think their claim is maintainable, and that the case of *Hill v. Perrott* (3 Taunt. 274), justifies this conclusion. There the defendant by fraud procured the plaintiff to sell

to an insolvent certain goods, which the defendant had got into his own possession. The Court held that the law would imply a contract to pay for these goods from the circumstance of their having been the plaintiff's property, and having come to the defendant's possession, if unaccounted for; and he could not be permitted to account for the possession by setting up the sale to the insolvent, which he had himself procured by the most nefarious fraud, because no man must take advantage of his own fraud.

In our opinion the defendant's conduct in this case should equally prevent his being allowed to set up the defence on which he relies. On the ground of excessive damages, we see no reason for interference. The defendant himself directed the proceedings which occasioned the cost of the articles. It is not clear to us that the credit of \$180 13 was properly applied to this account.

The rule should be discharged.

Rule discharged (a).

MCGILLIVRAY V. MILLIN.

Surface water—Obstruction—Right of action.

The plaintiff owned land south of and higher than the defendant's land, and the surface water in the Spring and Fall drained off in a channel of no definite width from the upper part of his lot to the lower, and thence to defendant's land into a pond from which no exit was proved, and which, with the rest of the low land, was usually dry from April to November. The plaintiff had dug a ditch to facilitate the drainage through his own land, and defendant, three or four years ago, had allowed him to plough a furrow in his land with the same object. This the defendant afterwards obstructed, and the plaintiff sued.

Held, that there was no right of action, for he was not a riparian proprietor, there was no proof of any easement, and no natural drainage at the spot obstructed until the ditch was dug there.

Semble, That the plaintiff's proper remedy was under the Act respecting Line Fences and Water Courses, C. S. U. C., ch. 57.

THE declaration stated that the plaintiff was possessed of

(a) Defendant applied for leave to appeal, but the application was refused.

certain land in the Township of Normanby, being lot 52 in the second concession, and was of right entitled that the waters collecting upon the lands of the plaintiff should run and be carried off from his land into a certain drain or water course, and into a pond on the defendant's land, being lot 51, in the second concession of Normanby; and the defendant, on the 16th of October, 1866, and on divers other days between, &c., wrongfully stopped up said drain or water-course, and obstructed the flow of the water, and prevented it from running into and through the said drain or water-course, as it otherwise would have done, whereby the water was penned back and flooded the plaintiff's land, to the plaintiff's damage, &c.

Pleas.—1. Not guilty. 2. That the plaintiff was not of right entitled to the waters collecting on his land running and being carried off through the land as alleged. 3. That there was not a drain or watercourse through the defendant's land, through which the plaintiff was entitled, as of right, to run the waters collected on the plaintiff's land into and through the defendant's land.

The case was tried in October, 1867, at Owen's Sound, before John Wilson, J.

The plaintiff and defendant owned adjoining lots, No. 52 (the plaintiff's) being immediately south of No. 51 (the defendant's). It was sworn that before any clearing was made on either the flats were flooded every Spring and Fall, in the latter with rain, in the former by the melting of the snow, and in wet Summers the water would lie on them, escaping partially at a place about fourteen rods east of where the water had since been conducted, as the evidence shewed, across the division between the lots. The land descended generally from the south side of the plaintiff's lot, as much as four feet or more, by the line which the water took. One witness said there was a hollow or pond towards the south side of the plaintiff's lot, from which the water so collected in the Spring and Fall spread northerly over the flats, which extended over both lots, and through them there was a slight depression of the surface along

which the waters passed, making what the plaintiff's son called a marked dark watercourse. On the plaintiff's land this watercourse was originally wide, irregular in width, but the plaintiff made it narrow, after the land had been cleared, (sixteen years ago) by ploughing a furrow and digging a ditch. It was agreed on all hands that the water on the land did not rise from the earth; it all came from rain or snow falls, and if no artificial aid had been given on the plaintiff's land a good deal of the water must have remained there till it evaporated or was absorbed by the ground. The flats, contracted in width when near the division line between the two lots; and upon the defendant's land and near his house there was only a channel or gully along which the water flowed past the defendant's house into a pond, from which no exit was proved to exist. The soil of the bottom of the pond was a gravel, and the water every Summer disappeared; grass grew over the greater part of it; some part could be cultivated. The whole of the flats and ponds were usually dry from April to November in every year. The plaintiff was proved to have cultivated the flats on his side, and to have ploughed the dark marked channel spoken of, over which one of his witnesses spoke of the grass growing. He had, as already stated, either ploughed a furrow or dug a ditch, or done both, to facilitate the drainage of his portion of the flats. While the plaintiff and defendant were on terms of neighbourly intercourse, the defendant allowed the plaintiff's son, about three or four years ago, to draw a short furrow upon his land to let the water off quicker. This furrow began opposite the defendant's house, and was ploughed as near to the line fence as a team could go. There were no decided edges to the line the water naturally followed, until it entered the defendant's land and got near to his house. There the water had made a deep gully down to the pond. The plaintiff continued his ditch or furrow to the division fence; on the defendant's side of the fence a short ditch was dug through (as one witness said) solid ground. Some dispute arose between the parties, and in October, 1866, the defen-

dant placed sods and earth about three feet on his side of the fence obstructing the escape of the water from the plaintiff's land ; and for the damage caused by this act the present action was brought.

The learned Judge told the jury that the question was whether there was a watercourse, and if so, whether defendant had obstructed it to the plaintiff's injury.

The defendant's counsel objected to the learned Judge telling the jury that there might be a watercourse although it became dry during part of every year, and that he should have directed that it was not a watercourse, because it terminated in a pond belonging to defendant ; also, that he should have told the jury what constituted a watercourse. The learned Judge reported that he did tell them.

They found a verdict for the plaintiff, and damages twenty cents.

K. McKenzie, Q. C., obtained a rule calling upon the plaintiff to shew cause why a nonsuit should not be granted, on the following objections taken at the trial, leave being reserved to move upon them :

1. That there was no proof of a natural drain or watercourse, or such as is described in the declaration, or of any acquired right to any drain or watercourse.

2. In substance the same as the first.

3. That there was no proof a drain or watercourse under a grant, user, prescription, or an award of fence-viewers under Consol. Stat. U. C. ch. 57.

4. That the alleged drain or watercourse was proved to be a periodical outlet or flood of surface water, collected on plaintiff's land, and not permanent or continuous.

5. That defendant is not bound in law to allow such surface water to be drained and carried off into and through his land, and to the pond which was defendant's property.

6. That defendant had a legal right to erect the obstruction complained of.

7. That the plaintiff claims an easement over defendant's land, which was not proved.

8. That the evidence shewed that an artificial channel had been formed on the defendant's land before the commencement of this suit, and before the alleged obstruction.

The rule also asked, in the alternative, for a new trial on the footing of the objections taken at *Nisi Prius* to the learned Judge's charge. He cited *Rex v. Inhabitants of Oxfordshire*, 1 B. & Ad. 289; *Regina v. Metropolitan Board of Works*, 3 B. & S. 710; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Fentiman v. Smith*, 4 East 107; *Rawstron v. Taylor*, 11 Ex. 369; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Hewlins v. Shippam*, 5 B. & C. 221; *Wood v. Lead-bitter*, 13 M. & W. 838; *Cocker v. Cowper*, 1 C. M. & R. 418; *Winter v. Brockwell*, 8 East, 308; *Taylor v. Waters*, 7 Taunt. 384; *McGillivray v. Great Western Railway Co.* 25 U. C. R. 69.

McLennan, shewed cause, and cited *Malone v. Faulkner*, 11 U. C. R. 116, 121; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Angell on Watercourses*, sec. 338; *Kent Com.*, Vol. III., Lecture 52; *Gale on Easements*, 189, 190; *Broadbent v. Ramsbotham*, 11 Ex. 614; *Embrey v. Owen*, 6 Ex. 370.

DRAPER, C. J., delivered the judgment of the Court.

The declaration does not claim the rights of a riparian proprietor, nor would the evidence have sustained such an assertion. On the plaintiff's land there was no spring or other local source whence the flow of the water proceeded, nor did it come as a stream from any adjoining land. There was no constant flow. When it rained sufficiently the stream ran in the fall, when the winter snows melted it ran in the spring, but from April to November there was no water running, unless perhaps the sudden outpouring of a heavy thunder-cloud might in the summer season create a short-lived torrent. There were no defined edges or banks confining the stream; its width depended on the greater or less quantity which drained down from higher portions of the land, its duration upon the quantity which the rain or snow furnished within the fall and winter.

Nothing was shewn to exist upon the plaintiff's land which either conferred upon him the rights or subjected him to the restrictions of a riparian proprietor, claiming on that ground *ex jure nature*.

His claim was that rain fell or snow melted on his land more than the soil would absorb: that the water collected from the higher portions on to the lower or flats: that as the defendant's land was lower than his the water would naturally drain off on to the lower land; and therefore, as it was necessary that this surface water should be carried off in order to enable him to use his land to the greatest advantage, and as it would naturally drain on to the lower land, he (the plaintiff) had a right to such drainage. He appears to us to claim that the defendant's land is a servient tenement and that he has a right over it as proprietor of the dominant tenement, and he therefore claims an easement.

But an easement can only be created by grant, either express or implied. Of express grant there is no evidence; the act of digging or permitting to be dug (a few years ago) a ditch through solid ground by defendant on his land, or a furrow to be drawn, to facilitate the escape of the water from the plaintiff's land, will not prove a grant, nor is there anything in those acts, or the actual enjoyment of the easement claimed, sufficient to establish a prescription. Independently of other reasons, the injurious act complained of is an obstruction in a place where, until the ditch spoken of was dug, the water did not find a natural drainage, if that would have altered or affected the case; and the ditch has been opened within the last five years.

In the most favorable point of view for the plaintiff which the evidence presents, his most effectual remedy is under the Consolidated Statute of Upper Canada respecting Line Fences and Watercourses (ch. 57).

In our opinion the rule should be made absolute for a nonsuit.

Rule absolute.

CREWSON V. THE GRAND TRUNK RAILWAY COMPANY.

Surface water—Rights to the flow of.

The plaintiff alleged that he was possessed of land through which a stream was accustomed to flow, and away from which the surface water was accustomed to escape, and that defendants negligently constructed an embankment on their railway across said land, by not providing sufficient openings to allow the water to escape. The jury found that "there was a stream of water, and it was obstructed by the railway"; There was a creek on the plaintiff's land, which clearly had not been interfered with; and the only obstruction shewn was of such a stream as a general flow of surface water would present on a gradual slope of land. *Held*, that the word stream in their finding must be taken to mean such water; and that as the plaintiff shewed no right to the land on both sides of the embankment, nor any easement over the land on the other side, he had no right of action.

The right of drainage of surface water does not exist *jure naturæ*, and the principles applicable to streams of running water do not extend to the flow of surface water.

DECLARATION.—First count, for obstructing and penning back the waters of a stream, which flowed through the meadow land of the plaintiff.

Second Count.—That the plaintiff was possessed of the north-west part of lot 32 in the first concession of Esquesing, through which a stream was accustomed to flow without obstruction, and away from which the surface water collecting thereon was accustomed to escape; and defendants so negligently constructed and maintained an embankment for the purposes of their railway across the said land, by not providing sufficient openings to allow the waters of the said creek or stream and the said surface water to flow away and escape from the said land, whereby, &c.—to plaintiff's damage.

Plea.—Not guilty, by Statute, 16 Vic. ch. 37, sec. 2, and Consol. Stat. C. ch. 66, sec. 83, both public Acts.

The case was tried at Milton, before Hagarty, J.

The plaintiff proved that surface water, arising principally from springy ground, of which he was in possession, collected, and owing to the natural slope of the ground, flowed on to and against an embankment constructed by the defendants, over land purchased by them, and on which embankment the railway runs.

The embankment had been constructed several years, and was finished five or six years before the plaintiff came into possession. For the first year or two after it was finished, the water seemed to have soaked away into or through the embankment, so that the land could be and it was cultivated, but of late for two or three years the water laid upon the plaintiff's land up to June or later, before it dried up. Besides this water there was a creek which crossed the plaintiff's land, but the waters passed and flowed through the embankment by means of a culvert, and were not obstructed when the plaintiff entered into possession five or six years ago.

It was objected for the defence that the first count clearly was not supported, and that the second charged negligence in the construction of the embankment, and no such negligence was proved.

Leave was granted to enter a nonsuit on these objections, and the learned Judge asked the jury whether before March 1865, the defendants did pen back water on the plaintiff's land which but for their works would not have happened, and what was the damage thereby incurred. He also asked them to find if any natural flow of a watercourse had been obstructed, or whether it was merely surface water or soakings that had been stopped. He commented unfavourably to the plaintiff on there being any flow of a natural watercourse or stream.

The jury found for the plaintiff and 1s. damages, and said "there was a stream of water, and it was obstructed by the railway."

In Easter Term following, *M. C. Cameron*, Q. C. obtained a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered, pursuant to leave reserved, on the ground that the evidence disclosed that there was no injury to the plaintiff by reason of the obstruction of a natural stream of water as alleged in the declaration; and the act of the defendants, if it injured the plaintiff, was an act done more than six months and more than six years before

the commencement of this suit; and on the ground that there was no evidence to sustain the plaintiff's declaration. He cited *Phear on Rights of Water*, 32; *Broadbent v. Ramsbotham*, 11 Ex. 602, 614.

In this term *Miles O'Reilly*, Q. C., shewed cause, citing *Carron v. Great Western R. W. Co.*, 14 U. C. R. 192; *Vanhorn v. Grand Trunk R. W. Co.*, 18 U. C. R. 360; *McGillivray v. Great Western R. W. Co.*, 25 U. C. R. 69; *Gale on Easements*, 334.

DRAPER, C. J., delivered the judgment of the Court.

We cannot very satisfactorily reconcile the finding of the jury "that there was a *stream* of water and it was obstructed by the railway," with the evidence of the plaintiff's father, that there was a stream which came north-east to a culvert under the embankment, for he says, "the creek was never stopped; the creek passes through the culvert; not a drop comes from the creek to the land." We presume the jury did not mean that there was a natural stream in addition to the creek, but by the use of the word "stream" meant the surface water on this land, which the plaintiff's father said was "wet land" when he got it and cleared it, before the plaintiff got possession, and that this water was obstructed by the railway from flowing as it otherwise would over other adjoining land, and so going off altogether by evaporation or absorption sooner than it now does.

It is, as we understand, upon the assumption that such is the fact, that the plaintiff claims a legal right to such a use of the land from which the embankment separates the land of which he is in possession, giving at the same time no proof that in any way he had acquired such a right, for he does not prove that he is or was the owner of the land on both sides of the embankment either now or when that embankment was constructed, nor that if it be the land of a stranger he has an easement over it, for the escape of surface-water from his own land. The first count clearly was disproved by the father's evidence; the defendant had

a right to a nonsuit or a verdict upon that. The second is framed to assert the claim we have just referred to, and as an easement resting upon a grant expressly or impliedly made.

We have in another case this term expressed our opinion that such a right of drainage does not exist *jure naturæ*: that the principles applicable to streams of running water, which are *publici juris*, do not extend to the flow of mere surface-water spreading over the land; (a) and in the absence of grant or sufficiently long enjoyment we think the plaintiff fails on the second count.

In *Shelton v. The London and North Western Railway Company*, (L R. 2 C. P. 631), the learned Judge directed a nonsuit, with leave to the plaintiff to move to set it aside and enter a verdict for a sum to be ascertained by the jury, and he left to the jury some questions of fact, which if the nonsuit were set aside should be determined by them, as well as the amount of damages. But the finding of the jury on these matters of fact did not affect the decision of the Court in sustaining the nonsuit, and here the leave reserved on the question whether the facts as stated in the second count gave the plaintiff the legal right which he asserted as the foundation of his claim to damages, is not affected by the finding there was a *stream*, for that must mean (on what appears) such a stream as a general flow of surface-water would present, on a gradual slope of land.

We have not felt it necessary to examine the objections raised by the rule as to the action being brought in time. The leave to move for a nonsuit does not appear to have been reserved in respect of them.

We think the rule should be made absolute.

Rule absolute.

(a) See *McGillivray v. Millin*, *ante* page 62.

THE CORPORATION OF THE UNITED TOWNSHIPS OF BURLEIGH, ANSTRUTHER, CHANDOS, CARDIFF, HARCOURT, BRUTON, AND MONMOUTH V. HALES ET. AL.

Original road allowance—Trees taken from—Right of Municipalities to recover for—C. S. U. C. ch. 54, secs. 314, 331, sub-sec. 5—Competency of witness.

Held, that a township corporation, without having passed any by-law on the subject, could maintain trespass for cutting and carrying away trees growing upon Government allowances for roads; for the power to pass by-laws for preserving or selling such trees, gave them also the right to recover from a wrong-doer their value, which right might be exercised without any by-law.

Held, also, that a person who when the suit was brought was entitled by agreement with the plaintiff to 25 per cent of the amount recovered for trees taken from such allowances, but who before the trial had released his right as regarded the land in question, was a competent witness.

TRESPASS.—The declaration stated that before, &c., there were surveyed and established divers allowances for public roads within the said united townships, upon which road allowances timber trees of great value were growing: that the plaintiffs, as a corporate municipality, were entitled to the said timber trees; yet the defendants, on divers days, &c., entered upon such road allowances, and cut down and carried away timber trees, and converted the same to their own use.

The second count specified certain road allowances in the northern division, and one road allowance in the southern division of the township of Burleigh, on which defendants entered, and cut trees, &c.

Third count: trover, for trees and timber.

Fourth: money counts.

Pleas.—Not guilty: a denial that any of the lands mentioned were the lands of the plaintiffs or that any of the timber trees were the timber trees of the plaintiffs; that the goods in the third count were not the plaintiffs; and never indebted to the fourth count. Issue.

The case was tried at Peterborough, in April, 1867, before John Wilson, J.

There were two questions raised. First, whether the plaintiffs could maintain trespass for cutting and carrying

away timber and trees growing upon Government allowances for roads, marked on the ground in the survey of the townships, assuming that these allowances had not been opened out and become travelled highways. Second, whether a person, who when this suit was brought was entitled by agreement with the plaintiffs to twenty-five per cent of the amount which should be recovered by the plaintiffs for trespass on and cutting and taking logs and timber off such allowances for road, but who before the trial, by an instrument under seal, in consideration of five shillings, had released his right to such per centage as to the lands stated in the declaration, was a competent witness for the plaintiffs, the learned Judge having received his testimony.

It seemed (though this part of the case was not very clearly made out in evidence), that the township of Burleigh was intended to contain twelve concessions, and thirty-two lots of 200 acres each in each concession, the lots numbering from south to north. From lot No. 1 to the line between lots Nos. 15 and 16, the survey seemed to have been sufficiently well marked to enable a surveyor in 1864, to trace and re-mark the lines, &c. But from the south boundary of No. 16, although there were some traces of the surveyor having been there, the marks of survey, if ever there, were almost wholly lost; and on the application of the Council of the County of Peterborough, D. P. S. Fitzgerald was instructed in January, 1864, to commence at the southern end of the township and trace up the old lines as far as the side road between the fifteenth and sixteenth lots, and post them according to the original plan of survey, while from the northerly limit of No. 16, to the north boundary of the township he was to survey the lots twenty chains wide by fifty chains deep, with a road allowance of one chain at every fifth lot and at every alternate concession. These instructions created sixteen concessions with twenty-six lots in each, all lying north of No. 15, with allowances for roads differing from such as would have been reserved on the original plan of survey; and in

addition Mr. Fitzgerald reserved allowances for roads round the waters and streams in the new survey, for which he stated he had the authority of the Commissioner of Crown Lands, such reservations being more for the convenience of landing than for use as roads. Owing, probably, to the different plans of survey, the part surveyed on the original plan was thenceforth called the southern division, and the other part the northern division of the township.

It was proved that prior to Mr. Fitzgerald's survey, the Crown had issued letters patent granting several lots or parts of lots in what is now called the southern division, and one grant dated since 1864 was put in for a lot in the northern division. Upon a question being raised, the learned Judge ruled that the Crown was bound by the adoption evinced in granting lots according to the old survey in the southern division, but that there was no proof of any survey before that made by Fitzgerald in the northern division.

It was objected for the defendants that the property in trees growing in spaces reserved in the original survey as allowances for roads, which had never been cleared, opened and travelled, was not in the municipality of the township, and that they could not maintain trespass for cutting such trees. The learned Judge overruled this objection, and reserved leave to the defendants to move to enter a nonsuit upon it.

The plaintiffs then gave evidence to establish that the defendants had cut trees of considerable value on some of the reservations for road, and chiefly in the northern division, and the jury found a verdict for the plaintiffs.

In Easter Term, *Hector Cameron* obtained a rule calling upon the plaintiffs to shew cause why a nonsuit should not be entered (leave having been reserved to move) on the ground that the plaintiffs had no such right or interest in the property in question as to enable them to sue in

trespass or trover, and that no by-law was proved to have been made by the plaintiffs in relation thereto; or for a new trial, there being no evidence of trespass to or conversion of any property of the plaintiffs; and for improper admission of the evidence of a party in whose direct and immediate behalf the action was brought.

In this term *C. S. Patterson* shewed cause, citing *Cochran v. Hislop*, 3 C. P. 440; *Corporation of Wellington v. Wilson*, 14 C. P. 299, 16 C. P. 124; *Corporation of Thurlow v. Bogart*, 15 C. P. 8; *Municipality of Sarnia v. Great Western Railway Co.*, 17 U. C. R. 65; Consol. Stat. U. C. ch. 54, secs. 314, 315, 323, 324, 325, 331, 336, 337, 339.

Hector Cameron, contra, cited *Corporation of Sarnia v. Great Western Railway Co.*, 21 U. C. R. 64; *Cochran v. Hislop*, 3. C. P. 440.

DRAPER, C. J., delivered the judgment of the Court.

The first question is as to the general right of the plaintiffs.

We think that, upon the evidence given in this case, we are warranted in assuming that the survey made by Mr. Fitzgerald was the original survey of the northern division of the township; as to the southern division, he simply retraced and restored the work done in the original survey.

We do not consider the question as to the right to the soil and freehold of original allowances for road to be open for argument in this Court. In the *Corporation of Sarnia v. Great Western Railway Co.* (21 U. C. R. 64), Burns, J., said, "Wherever the Crown has laid out a road or street without any reservation, I take it the soil and freehold remains in the Crown, subject to the easement which the public enjoys over it." And in the judgment of this Court in *Mytton v. Duck* (26 U. C. R. 61) in order to construe sections 314 and 336 of Consol. Stat. U. C., ch. 54, so as not to conflict, we adopted the suggestion of Burns J., in the above cited case, by limiting the operation of the latter to cases where individuals have laid out streets or roads for the public, and they have by user or otherwise

become public highways. The present case relates to the construction of section 314, the language of which leaves no room for doubt, if it be not limited by section 336. We conclude, therefore, that the soil and freehold of the roads in question was in the Crown.

But section 331 gave to Township Councils the power to pass by-laws both for opening roads and, (sub-section 5), for preserving or selling timber trees, &c., on any allowance or appropriation for a public road, and the effect of this enactment and the absence of any by-law on the subject are to be considered.

If there was no such provision, the property in trees growing on the road allowances would, undoubtedly, be in the Crown.

The leading object of the reservation of road allowances however, was not to grow timber trees upon them, but that they should be subservient to the advantage of settlers upon land adjoining or near thereto, as well as of the general public. We are not prepared to hold that a settler who cut down timber trees on an allowance for road *bonâ fide*, for the purpose of access to the lot on which he was settling, was liable to the Crown or to any one else as a wrong doer. Nor are we ready to affirm that a by-law of the township which prohibited, under a penalty, the cutting down of trees by a settler, and for such a purpose, would be within the spirit, though within the letter, of the Act a by-law "for the preserving of timber trees." But it does not, on the other hand, follow that, subordinate to the leading object of road allowances, the right to sell, if not the right to preserve, will not give to the municipality a qualified property in the timber trees growing upon such allowances.

The power to sell does, in our opinion, give the right to take the price for municipal purposes, and it must carry with it the power to confer upon the purchaser a right to enter, cut, and take away what is sold to him; but if the Township Council has such a property in the trees that they may sell them, and may pass by-laws to preserve

them from depredation, which must be by inflicting a penalty, it appears to us that to enable them to enjoy the full advantage which the Legislature meant to confer, they must also have the right to recover from a wrong doer the value of such timber trees, when he cuts and takes them away. We think they have this right, and unlike the power to preserve or to sell, that they need not pass a by-law in order to exercise it. We think, also, that they may recover for such a cause of action on a count framed as the first count is, in which it appears to us the charge is the cutting and carrying away the growing timber. It is not a count *quare clausum fregit*.

There remains only the question as to the admission of the witness Tallen. Before the Evidence Act it was well settled that whatever interest a witness may have had, if he was divested of it by release or payment, or by any other means, when he was ready to be sworn, there was no objection to his competency. Numerous cases establish this proposition ; many of them, *ex. gr.* that of co-partners, one of whom was made competent by release, being stronger than the present. The Evidence Act cannot be read so as to increase the objections on the score of competency. In the present case a release under seal of all the witness's interest was produced and proved.

We think the rule should be discharged.

Rule discharged.

SARAH PLANT, ADMINISTRATRIX OF WILLIAM PLANT V. THE
GRAND TRUNK RAILWAY COMPANY OF CANADA.

Railway—Contributory negligence—Negligence of fellow servant—Common employment.

Plaintiff as administratrix sued the defendants for the death of her husband, caused by a railway accident. It appeared that deceased, with three others and a foreman, was employed with a hand-car in clearing snow from the track near Limehouse station. The foreman saw a freight train approaching at speed a quarter of a mile off, upon which he left the men, telling them "to clear," and walked towards it waving a flag. Two of the men stepped aside when it came up, but deceased and the other man ran in front of it along the track, until it drove the hand-car against and killed them both.

Held, clearly a case of contributory negligence on the part of deceased; and a nonsuit was ordered.

One of the brakemen on the train swore that the brakes were defective, and that the train therefore could not be stopped in obedience to the proper signal, which was up. It appeared however that the defects mentioned by him could have been removed by tightening a bolt or shortening a rod, which any one employed by the defendants could have done in a few minutes; and other witnesses swore that with the brakes as they were after the accident the train could have been stopped, that it came up at a speed shewing no intention to stop at all, and with the engine reversed ran a quarter of a mile past the station, and that at the next station, on the same grade, and with the same brakes, it was stopped without difficulty.

Held, that these facts conclusively shewed the negligence not to have been that of the defendants, but of their servants engaged in a common employment with deceased, and for which therefore the defendants were not responsible.

THE declaration stated that the defendants so negligently and unskilfully constructed and maintained their road, and the engines and carriages driven upon the same, and the means and appliances for slackening the speed and stopping the engines and carriages, that the brakes became insufficient and useless for the purposes aforesaid, which the defendants at the time of the grievance knew, but of which the said William Plant was ignorant; and by reason of the said brakes being insufficient, &c., the said William Plant, then lawfully being on the track of the defendants' said road at or near Limehouse, was struck and killed by the said train. The plaintiff sued for her own benefit as widow, and for the children of the said William Plant, pursuant to the Statute.

Pleas.—Not guilty, by Statute, 16 Vic. ch. 37, sec. 2, and Consol. Stat. ch. 66, sec. 83, both public Acts.

The trial took place at the York Assizes, in October 1867, before Adam Wilson, J.

It was proved that the deceased, who was working as a day labourer clearing out snow from a cutting close to the Limehouse station, was killed a short distance from the station, which is between Acton and Georgetown, between which two places there is a down grade going from West to East. There is a deep cutting, partly through rock, at Limehouse, altogether about four hundred yards long, and there is a curve on the road to the west of the cutting. There is a space on each side between the rail and the wall of the cutting, somewhat exceeding six feet.

In February 1866, just after a heavy fall of snow, a cattle train of the defendants, which had come from Sarnia, having been kept the night before at Berlin in the snow, reached Limehouse at about three o'clock on a Thursday afternoon. A second engine had been put on this train at Berlin, and when it left that place it consisted of two engines and tenders and twelve cars.

There is a semaphore to the west of Limehouse station, which could be seen from the train when it reached about half a mile west of it. This semaphore is six hundred feet west of the cutting. The train had two brakemen, one to each six cars, being the usual number. One of them died before the trial, the other was dismissed by the defendants immediately after the accident. He swore that the brakes on these cars were defective, and would not hold; only two or three were good. He complained that the dogs were loose and flew up, and that some of the rods were too long; that five or six good brakes would have stopped the train. He also stated further, that when the train approached the semaphore was up: that the snow plough was on in front (no other witness mentioned this) throwing the snow up pretty high, so that it might prevent the engine driver from seeing ahead, although he standing on the top of the cars could see, and that he saw the semaphore up when about a

quarter of a mile west of it; that both brakesmen commenced putting on the brakes before the whistle sounded "on brakes," but the train ran on a quarter of a mile past the station before it stopped. Another witness said the engine was reversed about the time the train reached the semaphore.

The semaphore being up was a signal to the engine driver not to pass it, and the whistle sounded on brakes, according to one of the witnesses, about six hundred yards before the train reached it.

The section foreman at Limehouse had hired the deceased by the day for the defendants. There were six men at work with a lorry or hand-car, clearing snow out of the cut, two regular section men and four extra, one of the latter being absent at the moment. The section foreman saw the train coming when it was a quarter of a mile off, and he went towards it waving a red flag: he walked nearly to the west end of the cutting, and then stepped aside and the train passed him. When he left the men with the lorry on the track, he told them "to clear." There were four of them together; Plant (the deceased) and one Sullivan were on the track by the lorry. The other section man and one of the extra men stepped to the side till the train went by. The engine drove the lorry before it. Plant and Sullivan, instead of stepping off the track, as the others did, ran along it for some distance, and the lorry struck and killed them both.

On the defence it was sworn that there were at least ten good brakes on that train, not counting those on the tenders, and that with that number and two engines a train could be stopped in a distance of a quarter of a mile: that this train might be kept under perfect control, as it was in fact when they went into Georgetown immediately afterwards, on the same descending grade: that the engines and tenders were in good order, and were alone sufficient to stop this train of twelve cars: that as the semaphore was up it was the duty of the conductor to have stopped there: that the train was examined at Stratford, and no defects were

noticed, and that the conductor could have got any car changed at Berlin on reporting the necessity for it: that as to the dogs, it was only necessary to tighten a bolt to make them firm, which could be done at once: that the rods had holes drilled in them, and if too long could be taken up a hole in a minute or two.

The learned Judge reserved leave, on objections taken at the close of the plaintiff's case, to move to enter a nonsuit. He commented on the evidence very fully. He said he could not direct that it was negligence in the defendants if there was some slight thing out of order which could be easily repaired by almost any body, or when the conductor in charge of the train could have obtained a better car by simply asking for it upon reporting the necessity: that if the engine was reversed at the semaphore, five hundred yards west of the station, and the train was not stopped till it passed the station for a quarter of a mile, it shewed with what speed the train must have been running on to the semaphore, although it was seen to be up at a distance of a quarter of a mile before the train reached it; it also shewed that the train could not be stopped within a convenient distance.

The jury found for the plaintiff.

The declaration as originally framed only charged that the defendants so negligently and unskilfully constructed their track and road at and near Limehouse, and managed and conducted a certain train of engines and cars thereon, that the said William Plant then lawfully being on the said track or road was struck &c. It was amended and put into its present form on application to the learned Judge at the trial.

McMichael obtained a rule calling on the plaintiff to shew cause why a nonsuit should not be entered, pursuant to leave reserved, or for a new trial, the verdict being against law and evidence, and on the ground of misdirection, in leaving the question to the jury whether the deceased was excited and had lost his presence of mind when he met

with his death, and in telling the jury that the looseness of the catches of the brakes (the dogs) was because of their imperfect construction, and in leaving the question of surprise to the jury, when it was shewn that the foreman went forward to meet the train without any risk: that the verdict was against evidence, when it was shewn that the accident was brought about by contributive negligence of the deceased; and on affidavits.

Hector Cameron shewed cause, citing *Morgan v. Vale of Neath R. W. Co.*, L. R. 1 Q. B. 154; *Tunney v. Midland R. W. Co.*, L. R. 1 C. P. 294; *Feltham v. England*, L. R. 2 Q. B. 33; S. C. 4 F. & F. 460; *Holmes v. Clark*, 7 H. & N. 937; *Mellors v. Shaw*, 1 B. & S. 437; *Bartonshill Coal Company v. Reid*, 3 Macq. 266; *Paterson v. Wallace*, 1 Macq. 748; *Wright v. Skinner*, 17 C. P. 334; *Redfield on Railways*, 525.

McMichael, contra, cited *Searle v. Lindsay*, 11 C. B. N. S. 429; *Potter v. Faulkner*, 1 B. & S. 800; *Gallagher v. Piper*, 16 C. B. N. S. 669; *Waller v. North Eastern R. W. Co.*, 2 H. & C. 102.

DRAPER, C. J., delivered the the judgment of the Court.

The motion for nonsuit appears to us to present two questions. 1. Was the death of William Plant occasioned by the negligence of the defendants, or by the negligence of their servants who had charge of or were employed on this train, and was the deceased engaged in the service of the defendants at the time he was killed.

2. Did the deceased by his own negligence contribute to the injury which caused his death.

An affirmative answer to either of these questions will entitle the defendants to a nonsuit.

The law upon the first point is clearly settled. The principle is stated by Lord Cranworth in the oft-cited case of the *Bartonshill Coal Company v. Reid* (3 Macq. 266) Servants must be supposed to have the risk of the service in their contemplation when they voluntarily undertake it and agree to accept the stipulated remuneration. If

therefore one of them suffers from the wrongful act or carelessness of another, the master will not be responsible. This however supposes that the master has secured proper servants and proper machinery for the conduct of the works.

The case for the plaintiff as to this point rests on the allegation and evidence given in support of it, that the brakes, an important part of the machinery or appliances for regulating the cars in checking and controlling their motion, were defective and inefficient for that purpose.

The evidence of the brakesman taken without qualification would sustain the plaintiff's contention, for he swears to the insufficiency of the larger portion of the brakes which were on that train, and that the train could not be stopped in consequence, as from the signal afforded by the semaphore he well knew it should have been, and as he attempted before the whistle was sounded for that purpose, by using such of the brakes as were serviceable. There are however many facts in evidence to neutralize his testimony. First, as to the defects in the brakes which he particularized, it appeared that they were of a character that by tightening a bolt and taking up a rod, in a manner for which the rod was made suitable, these defects would have been removed, and that any person employed by the defendants could have done it in a minute or two—all which shewed negligence in the servants of the Company in their care and dealing with proper and sufficient appliances.

In *Searle v. Lindsay* (11 C. B. N. S. 429) the action, which was for a serious injury to the plaintiff caused by the handle of a winch at which he was working coming off for want of a nut or pin to secure it, failed, because it was the duty of another person, who as well as the plaintiff was in the employment of the defendants, to keep this in order. Erle, C. J., nonsuited the plaintiff, and the Court upheld the nonsuit, though, we may almost say, deploring the necessity imposed upon them by the conclusion of law. The principle seems to us precisely applicable here, where the state of the dogs and the undue length of the

rods were matters such as could not escape notice, and could have been immediately and easily remedied, and where we conceive it must have been the duty of some of those employed in the conduct of the train to have remedied them, or of the conductor if it were necessary to exchange the car or cars.

But there are other matters which in our opinion displace this evidence of the cause of the injury. The distance at which the semaphore was seen before the train reached it—the distance within which the train could be stopped, with the brakes as the defendants' witnesses swear they saw them the morning after the accident—the fact that with the engine reversed the train was not stopped until it passed the station a quarter of a mile—the fact that the train came on at a rate of speed (as the section foreman said) indicating no intention to stop, though the semaphore being down it was a duty to stop—and the fact that with the same brakes and appliances there was no difficulty in stopping the train at Georgetown; all these taken together tend to shew conclusively that it was negligence, not of the defendants, as charged in the declaration, but of the persons employed by the defendants in the conduct and management of the train, that caused the mischief which occurred.

The case of *Tunney v. The Midland Railway Company* (L. R. 1 C. P. 291) is precise to shew that the plaintiff was with those so employed on the train in the common employment of the defendants, and comes within the rule which exempts the master from responsibility for an injury to one servant caused by the negligence of another when both are acting in a common employment. *Morgan v. The Vale of Neath Railway Company* (5 B. & S. 570) is even a stronger case to the same effect.

It may be however insisted, that as this conclusion of law is based upon an assumed state of facts as to which there was contradictory evidence which must be submitted to a jury, therefore that the rule could only be made absolute for a new trial. The opinion we have formed on the

second question renders it unnecessary to come to a decision whether as to the first the rule should be for a nonsuit or a new trial.

Upon the second question we concede the liability of the defendants, if there was not contributory negligence on the part of the deceased.

The recent case of *Skelton v. The London and North Western Railway Company* (L. R. 2 C. P. 631) appears to be conclusive in the defendants' favour. There a railway consisting of several lines crossed a footpath at a level, at a point near the station. On each side of the railway was a good and sufficient gate, as required by an English Statute. The Railway Company by way of extra precaution usually, but not invariably, fastened these gates when a train was approaching. The deceased, to whom the plaintiff was administratrix, wishing to cross the railway found the gate unfastened and a coal train standing immediately in front of it. He waited till the train had moved off, and then, without looking up or down the line, commenced to cross the railway and was killed by a passing train. If he had looked up the line, he would have seen the train coming in time to stop and avoid the accident. He was called to, but being deaf took no notice. The Court held that he contributed to the accident by his negligence, and that the Company therefore were not liable.

The facts of the present case appear to us to be stronger. The deceased was at work on the track with others. The section foreman, under whose direction they were working, both heard and saw the train. He told the men "to clear," warning them what to do, while he walked towards the train waving a flag. It cannot be supposed that the deceased neither heard nor saw this. The train came closer towards them; two of the four men stepped off. The deceased and Sullivan set off to run along the track, the lorry being between them and the advancing train, and they continued to run along the track until the lorry driven on by the engine struck against and killed both. It is not stated how far they ran, though it could not have been many

yards, but for the whole way which they did run they might have stepped off to the right or to the left and have been safe. We can scarcely imagine a clearer case of contributory negligence. It has been argued that the plaintiff's intestate was taken by surprise, without warning, and lost his presence of mind and judgment, and so did the most foolish thing he could have done. But he had warning; he was in common with the other workmen told "to clear," to get out of the way. It is not suggested that he could neither hear nor see as well as the foreman, who swore he heard and saw the train a quarter of a mile off, and spoke to his men. The deceased must have seen the foreman walking as he swore nearly to the west end of the cutting, and still more must have seen two of his fellow workmen step off on one side as the train came up. If the case we have cited be good law, this action must fail, and the case is only an application of well settled law. The vigorous judgment of Bramwell, B., in *Stubley v. The London and North Western Railway Company* (L. R. 1 Ex. 13) may well be appealed to in answer to this argument, to uphold which would only be to introduce a new element into the question of contributory negligence, and render necessary an enquiry whether a person has strong or weak nerves.

The loss and misfortune to the plaintiff and her children is doubtless very serious and sad, but we must not be drawn out of our path of duty, even by our feelings for the widow and the orphan.

We think the rule should be made absolute to enter a nonsuit.

Rule absolute.

BROWN V. CLINE.

County Court—Appeal—Judgment signed—Practice—Irregularity or nullity.

Defendant in the County Court obtained a rule *nisi* to enter a nonsuit, with stay of proceedings; it was not signed by the Clerk, but had at the side the words "Rule *nisi* granted: W. Salmon, Judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the Judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff—

Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken; and on this ground the appeal was allowed.

APPEAL from the County Court of Norfolk.

A verdict was rendered for the plaintiff, and in the following term a motion was made for a nonsuit on leave reserved, or for a new trial. The learned Judge, on the 7th October, 1867, granted a rule with stay of proceedings, which concluded "By the Court," having no Clerk's signature, but at the side was written "Rule *nisi* granted: W. Salmon, Judge." This rule was served on the same day, on persons supposed to be agents for the plaintiff's attorney, and on the 9th it was served on the attorney himself. On the return of the rule the plaintiff's counsel put in an affidavit that final judgment was that day signed, saying that he did not consider the paper served a legal rule *nisi*. The learned Judge held that it was a proper rule, and that the judgment was a nullity, as he had stayed the proceedings, and he made the rule absolute for nonsuit.

The plaintiff appealed.

J. A. Boyd, for the appellant, cited *Doe Bloomer v. Bransom*, 6 Dowl. 491; *Doe Duncan v. Edwards*, 7 Dowl. 547; *Commercial Bank v. Hughes*, 4 U. C. R. 167; *Hastings v. Champion*, 6 O. S. 29; *Rex v. Calvert*, 2 C. & M. 189; *Doe dem. Whitty v. Carr*, 16 Q. B. 117; *Lloyd v. Berkovitz*, 16 M. & W. 31; *Wood v. Grand Trunk R. W. Co.*, 16 C. P. 275.

M. C. Cameron, Q. C., contra.

HAGARTY, J., delivered the judgment of the Court.

Without entering into the general merits of the case, we are met at once by the difficulty as to the signing of judgment.

We think that it was necessary to get rid of that judgment before any other proceeding could be taken.

The case of *Wood v. Grand Trunk Railway Co.* (16 P. 275), seems in point, and the Court there held, that the judgment cannot be treated as a nullity, and suggests the test, "Can the irregularity which constitutes the nullity be waived?" We think it could be waived, and was only an irregularity.

We must allow the appeal on this ground.

In order that the case may be fully heard and disposed of in the Court below, we direct that, instead of the rule absolute, a rule shall issue enlarging the rule to shew cause till the second day of next County Court Term, and amending the rule *nisi* by directing it to be signed by the Clerk of the Court. In the meantime defendant can take such proceedings as he shall be advised against the judgment.

Appeal allowed.

CLOY ET AL. V. JACQUES ET AL.

Ship owners—Liability for supplies furnished.

Action for provisions furnished by the plaintiffs to steamboats belonging to and run by the defendants. It appeared that the steward of each boat was bound by contract with the defendants to furnish these supplies, but there was contradictory evidence as to the plaintiffs' knowledge of this arrangement, and as to the circumstances under which the goods were ordered and furnished. The jury having found for the plaintiffs—

Held, 1. That upon the evidence, set out in the case, a new trial was properly granted in the County Court.

2. That no absolute rule can be laid down as to the liability of ship owners in such matters, but each case must depend on its own facts; and that here the jury should be asked, upon all the evidence and considering the nature of the business, to whom was the credit given, were the parties ordering the supplies the defendants' agents for that purpose within the ordinary rules as to principal and agent, and was the natural inference of the defendants' liability sufficiently rebutted by the plaintiffs' knowledge of the true arrangement?

The manner in which the Appeal Books were written remarked upon.

APPEAL from the County Court of Lincoln.

The action was brought for supplies, chiefly provisions, furnished by the plaintiffs to certain steamboats belonging to the defendants, carrying freight and passengers from Montreal to the upper lakes. The plaintiffs furnished these goods on orders from the stewards of the boats as they passed the Welland Canal, and, as they averred, on the credit of the boats.

It appeared that there was a bargain in writing between the defendants and their stewards, by which the steward bound himself (with a surety) to board the crew for the season, at \$9 per month each man, with extra allowance of \$24 per month for cook and cook's mate, and for meals eaten in cabin 17c. per meal, and for those in forecastle 12½c. a meal; "and that all supplies purchased at an American port or elsewhere, should be paid for before the vessel leaves port."

The plaintiffs gave evidence that they gave the goods on the credit of the boats, and never heard that the stewards were contractors; that the stewards and pursers would frequently be in, and the purser would make payments, and one of the pursers offered to carry freight on account of supplies.

One of the stewards swore he got the goods on the credit of the boat: that he got money at different times in 1865 from the purser of his boat to pay for supplies, and paid a good deal of money to the plaintiffs that year, (the bulk of the supplies were in that year): that he got money from time to time as he required it.

A letter was put in from the defendants to the plaintiffs, after this claim was made, in which defendants said "Our pursers are supplied with cash to pay for supplies as needed, and forbidden to buy on credit."

The defendants were the admitted owners and ran the boats for their profit, carrying freight and passengers, who were furnished with meals on board.

For the defence, other stewards and masters were called. One steward (Walker) proved that he acted on a similar contract, and was paid by defendants at the end of the

fall. Some of their captains (Ray, Moran, and Vaughan) proved that they never had anything to do with the purchase of goods furnished to the stewards: that last year (1866) one of the plaintiffs was cautioned about giving credit, as he never would be paid if he did so. Another steward proved that in 1865 he got goods from the plaintiffs on his own credit, distinctly so understood, and they spoke of the steward's contract. Another witness, Wynn, said he was in the habit of sailing vessels; that the master sees to the quality of the supplies, the steward buys the goods.

A witness said that the defendants advertised every year they would not be responsible for goods furnished to stewards, and that it was generally known along the line of the Welland Canal that the defendants contracted their boats.

The jury were told that the stewards could not without the captain's or owner's authority pledge the credit of the boats: that the plaintiffs could not give credit to unauthorized agents: that the stewards were not the proper husband of the boats, but captains were: that the plaintiffs were in the same position as selling goods on credit to a servant without his master's authority, not shewing that the steward was in the habit of buying on credit; and that if the plaintiffs knew of the contracts, the case was at an end.

The jury however found for the plaintiffs; and in the next term, on the defendants' application, a rule was made absolute for a new trial without costs, the verdict being perverse, contrary to the Judge's charge, and on the law and evidence.

The plaintiffs appealed from this rule, alleging the direction to the jury to have been wrong in law.

Harrison, Q. C., for the appellants, cited *Frazer v. Marsh*, 13 East 238; *Maitland v. Harris*, 13 U. C. R. 118; *Whitwell v. Perrin*, 4 C. B. N. S. 412; *Lynch v. Shaw*, 17 U. C. R. 241; *Abbott on Shipping*, 8th ed., 34; *Perrott v. Willis*, 9 Ir. C. L. Rep. 338.

M. C. Cameron, Q. C., contra.

HAGARTY, J. delivered the judgment of the Court.

On the merits of the case, as disclosed in evidence, we see no reason whatever for interfering with the discretion of the learned Judge in granting a new trial, and on this ground alone we must dismiss the appeal.

It is not easy, in the conflict of cases, to lay down any unqualified rule of law as to the liability of the owners in such a case. It should first be remarked, that this is not one of a very large class of cases in which it has been sought to charge the mere legal or registered owner of a vessel for supplies furnished, without any actual privity between him and the person ordering such supplies. The defendants here were the owners of the boats, running them at the time for their immediate profit. The provisions furnished to the crew and meals to the passengers were ordinary incidents of that particular trade, and have to be bought from port to port as the vessel proceeds on her voyage. We need not enter into any discussions about ship's husbands, or the peculiar position of the master and the steward. Some one officer has to order provisions; and a witness for the defendants shewed that the master only sees that a proper quality of provisions is brought on board, but does not purchase any. Such a service we must assume would be ordinarily done by the steward or purser.

In a case of *Lynch v. Shaw*, in this Court, (17 U. C. R. 241) it appears that wood was furnished to a lake steamer, and receipts therefor were produced signed by the purser. The late Sir John Robinson, says, "Presumption of ownership arising from possession and management of the ship would, I think, be sufficient evidence *primâ facie* to make the defendants liable." The case failed because ownership could not be proved. In *Abbott on Shipping*, 11th ed., 1867, p. 27, it is said "Recent cases have decided that the true question in matters of this description is, upon whose credit was the work done?"

In *Whitwell v. Perrin*, (4 C. B. N. S. 417) Byles J. says, "The mere fact of a man being owner or part owner of a ship, or registered as owner, does not make him liable for

work done or goods ordered for the ship; but, as Jervis, C. J. puts it in *Brodie v. Howard* (17 C. B. 117) the question is, with whom was the contract? Was the party giving the order the agent of the owners for that purpose?" See also the language of Parke B. in *Mitcheson v. Oliver*, in Error, (5 E. & B. 443).

The rule is laid down in *Addison* on Contracts, 5th ed., 1110, "Servants entering into contracts on behalf of their masters in the usual course of their employment, bind the latter by their contracts, although in the particular instance they had no authority to do the act in question. If a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master is not chargeable. But if the servant usually buys for the master upon tick, and the servant buys some things without the master's order, yet if the master were trusted by the trader he is liable * * But if the plaintiff has shewn a want of due caution, or has trusted the servant to an improper extent, the master will not be liable."

In a case there cited of *Stubbing v. Heintz* (Peake 66) Lord Kenyon says, "Nothing can be clearer than that where a man gives his servant money to pay for commodities as he buys them, if the servant pockets that money the master will not be liable to pay it over again;" and in a note, "If the master never had any previous dealings with a tradesman, but a tradesman's dealings have all been with the servant, whom the master has regularly paid, in that case the master shall not be charged."

In *Miller v. Hamilton* (5 C. & P. 433) a baker delivered bread at defendant's house from time to time. Weekly bills were delivered every week to the defendant's house-keeper. Two weeks had been paid, as had also the whole of the bills from the 24th May to the end of August, when the house-keeper left the defendant's service. Shortly after she left, payment of some omitted weeks was for the first time demanded of the defendant. It was proved that the paid bills were all separately receipted, though sometimes three or four weeks were paid at one time. It was proved that the

plaintiff had said he had done wrong in receipting the bills and leaving the back debt. Lord Denman held the plaintiff could recover: that "it did not appear that defendant ever gave any money to his housekeeper to make these payments with."

In *Rimell v. Sampayo* (1 C. & P. 255) the plaintiff proved that the defendant's coachman came and hired horses at so much a month, saying he wanted them for his master's carriage. Defendant was afterwards seen several times riding in the carriage drawn by these horses. On objection, that the coachman's authority must be shewn, Littledale J., held that so far the coachman appeared as defendant's agent: that authority need not be proved, for the master used the horses afterwards.

This case would tend to shew that a *prima facie* case was in the case before us made for the jury, capable of course of subsequent explanations and rebuttal.

In the last case cited, it was proved for the defence that the defendant contracted with his coachman to provide horses, his own livery, and everything connected with the carriage, at so much a-year. The coachman denied having hired in the name of the defendant, but said he had told his master where he had hired them, and that when he returned the horses the defendant advanced him £5 to help to pay for them. Defendant had paid the coachman all due under the agreement. Littledale, J. said "The principal question will be, what representation was made by the coachman at the time of the hiring. If he made the contract in his own name, and represented to the plaintiff the agreement between himself and his master; of course, under such circumstances, the plaintiff cannot recover. But if he made no such representation of any agreement between himself and his master, I think that, by the master's sending him forth into the world, wearing his livery, to hire horses, which he (the master) afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire."

In the present case there was no direct proof that the defendants furnished their stewards beforehand with funds to purchase supplies. One of the stewards swore that he was paid by defendants at the end of the fall.

We agree with the learned Judge that there was ample reason for submitting the case to another jury on the merits. At another trial it will be proper to submit the questions to the jury, as suggested in the cases cited, with whom was the contract made,—to whom was the credit given—was the party giving the order the agent of the owners for that purpose? under the ordinary rules as to contracts made by alleged agents, and unembarrassed by mere technicalities about ship's husbands. The nature of the business must be considered, and how it is generally transacted on steamboats plying as these boats were shewn to be; for whose benefit and profit were the supplies furnished, but especially, on all the evidence, what was the true contract entered into with the plaintiffs, on whose credit did they furnish supplies, and what was the extent of their knowledge of the position of the steward with whom they dealt, and whether the natural inference of the defendants' liability to pay for the food of their men and passengers was successfully met and rebutted by a disclosure of the true state of the case.

It may be proper to enquire whether the purser is not the officer or person through whose agency supplies are obtained, and by whom moneys are paid, the steward being in a subordinate situation, not *primâ facie* giving him authority to contract when there is a captain and a purser, to one or the other of whom such business would apparently belong, and to either of whom reference as to the steward's authority might be made.

It is impossible to lay down an absolute rule, as every case may have facts peculiar to itself, which must be all submitted to the jury.

We cannot dismiss this case without noticing the manner in which some parts of the appeal books have been written. With every desire to make all reasonable allowance for the

various kinds of good, bad, and indifferent writing, we find this case presenting examples of penmanship, beyond even our experience.

It may be doubtless a most exemplary duty to teach boys to write, but we object to the appeal or demurrer books of this Court being used as their copy books.

Appeal dismissed.

GILKISON V. ELLIOTT.

Dower—Settlement in lieu of—Possession by demandant.

Dower. Equitable plea, that by deed, before and in consideration of the demandant's intended marriage, it was agreed between her and her intended husband, that certain lands should be conveyed by him after marriage to trustees, to his use for life, then to her use for life, then to the use of the issue of the marriage, and in default of such issue to his heirs: that after the marriage the lands were accordingly so conveyed, and the demandant after her husband's death became seized and entered into possession of such lands under the settlement in lieu and satisfaction of her dower in all his lands, according to said settlement.

Held, on demurrer, a bad plea, for there was no provision express or implied that such settlement was to be in lieu of dower; and the allegation of entry in lieu, the land being her own, could make no difference.

There was also a plea that demandant had been in possession of the land in which dower was claimed since her husband's death. *Held*, no bar, for this could not deprive her of her right to have dower assigned.

DOWER.

Second Plea, on equitable grounds.—That the said Daniel Mercer Gilkison deceased, (the husband) in his lifetime and before his marriage to the said plaintiff, was seized and possessed of the lands, tenements and premises hereinafter mentioned, and the plaintiff before her said marriage, and whilst she was of the full age of twenty-one years, and the said D. M. G., agreed by memorandum in writing under their hands and seals, in consideration of the said plaintiff marrying him, the said D. M. G., that the said D. M. G. would on the said marriage being duly solemnized, assure and settle the lands and tenements hereinafter mentioned, by a good and sufficient conveyance in the law, unto one William

Muirhead and Jasper Tough Gilkison, their heirs and assigns, to the use of the said D. M. G. during his natural life, and from and after his decease then to the use and behoof of the said plaintiff for and during the term of her natural life, and from and after her decease then to the use and behoof of the heirs of the body of the said plaintiff by the said D. M. G. lawfully begotten, and for default of such issue her surviving, then to the use and behoof of said D. M. G., his heirs and assigns forever. And the said D. M. G. in his lifetime, after the marriage of the said plaintiff with the said D. M. G., in pursuance of the said agreement, did convey, assure and settle unto the said W. M. and J. T. G. their heirs and assigns, all and singular those certain lands &c., (describing them) unto and to the use of the said D. M. G. and his assigns, for and during his natural life, and from and after the decease of the said D. M. G., then to the use and behoof of the said plaintiff, for and during the term of her natural life, and from and after her decease, then to the use and behoof of the heirs of the body of the said plaintiff by the said D. M. G. lawfully begotten, and for default of such issue her surviving, then to the use and behoof of the said D. M. G. his heirs and assigns forever. And the said plaintiff after the decease of the said D. M. G. entered into possession of the said lands, tenements and premises, and became seized and possessed thereof by virtue of the said settlement, and then received and entered into possession of the said lands, tenements and premises, under the said settlement, in lieu, recompense, and satisfaction of her dower of in and to all the lands of the late D. M. G. deceased, of which the lands and premises in the said demand mentioned were a part, according to the said settlement so made to her in that behalf.

Third Plea.—That the said plaintiff hath been in possession of the said lands in the said demand mentioned since the death of her said husband, and during that time took and received and still continues to take and receive to the use of the said plaintiff all the issues and profits, and the beneficial use and occupation of the said lands in the said

demand mentioned, from the death of her said husband, and hath not been detained from her endowment therein as alleged.

Demurrer to each plea, and joinder.

McMichael, for the demurrers, cited *Sug. R. P. Stats.*, 2nd Ed., 245 : *Drury v. Drury*, 2 Eden 39.

W. H. Burns, contra, cited *Dyke v. Rendall*, 2 De G. M. & G. 209, S. C. 16 Jur. 939, 21 L. J., Chy., 905 ; *Com. Dig. Dower*, p. 516 ; *Jamieson v. Fisher*, 2 E. & A. Rep. 212 ; *Killen v. Campbell*, 10 Ir. Equ. Rep. 461, 470 ; *Garthshore v. Chalie*, 10 Ves. 20 ; *Earl of Buckinghamshire v. Drury*, 2 Eden 66 ; *Vorley v. Barrett*, 1 C. B. N. S. 225 ; *Williams v. Waters*, 14 M. & W. 166 ; *Walmsley v. Walmsley*, 26 U. C. R. 392.

HAGARTY, J., delivered the judgment of the Court.

The facts seem very intelligible. By agreement before and in consideration of marriage, a certain part of the real estate of the husband is to be conveyed to trustees to the use of the grantor for life, then to the use of the wife for life, then for the issue, and in default to the grantor's heirs. Nothing whatever is said as to dower or jointure, or provision for the wife. The lands are so conveyed; the husband dies; and the widow enters upon and holds the settled land.

It is not easy to see, on such a state of facts, how or why she is to stand barred of dower in all the rest of her husband's estate. The property settled may have been of trifling value, the residue of his realty very valuable. It seems a mere setting apart of a portion of land, which she was in any event to have for her life if she survived her husband. We cannot see how any Court of Law or Equity can add to the agreement another term not contained in it—viz : that in consideration of the settlement of this part of her estate she is to abandon all interest in the rest.

The case cited by Mr. Burns of *Dyke v. Rendall*, before Lord St. Leonards, as Chancellor, (16 Jur. 939, 13 Eng. Rep.

404) was very different. There, by the settlement on the marriage, certain personal estate was invested, and bonds given to trustees, "in consideration of the marriage, and for providing a competent jointure and provision of maintenance for said E. S., in case she should outlive the said T. D., and for securing a provision for their issue."

Lord St. Leonards says, "I think it is clear that there was here a declaration, on the face of the settlement, that would in this Court be a clear bar of dower * * I am clearly of opinion that the true ground of the equitable bar is that of contract * * An equitable bar of dower, therefore, as to an adult, has not the qualities necessary for creating a legal bar; everything depends upon contract." The property there settled was personalty.

The effect of the settlement as a legal bar under the provisions of the Statute of Uses, 27 H. VIII. ch. 10, was not argued before us. It is proper however to notice it.

The sixth section, which creates the bar, speaks of the estate being conveyed "for the jointer" (*i.e.* jointure,) "of the wife; that then in every such case, every woman married, having such jointer made or hereafter to be made, shall not claim, nor have title to have any dower of the residue of the lands, tenements or hereditaments, that at any time were her said husband's, by whom she hath any such jointer * * but if she have no such jointer, then she shall be admitted." &c.

It may be sufficient to say here that it is not pleaded that the settlement was expressed to be either as a jointure or by way of jointure or provision for the wife, or in lieu of dower, or even that it was as a matter of fact done on such consideration. Lord St. Leonards explains the effect of the clause; and in *Vizod v. Londen* (2 Kelynge Chy. Cas. 17) Lord King says, referring to the Statute, "The words are expressly 'for the jointure of the wife,' but the Statute does not say that the jointure must be, to be expressed in bar of dower. The bar of dower is only a consequence of its being a jointure; and a jointure, according to my Lord Coke, is a provision and maintenance for the wife, and sure this is

expressed to be so, and therefore within the description of it. Before the Statute 29 Car. II, of Frauds, a parol averment of any such provision being made as a jointure was sufficient."

Vernon's case (4 Rep. 1) is a full exposition of the law on this clause of the Statute of Uses, and also as to how it may be averred, &c., &c., bearing in mind that of course the Statute of Frauds was not then in existence.

The law is further discussed in Sudgen's Property Statutes, 244, Ed. of 1862; see also *Killen v. Campbell* (10 Ir. Equ. Rep. 465); and in *In re Dwyers* (13 Ir. Chy. Rep. 438) many of the authorities are reviewed.

From these cases it would seem that it is not absolutely necessary that the settlement should state it to be in bar or lieu of dower, and quotes Lord St. Leonards' words in *Creagh v. Creagh*, (8 Ir. Equ. Rep. 70) "The word 'jointure,' in construction of law, *ex vi termini* means a provision in bar of dower."

The averment in the plea before us that the demandant entered upon and enjoys the settled estate in lieu, &c., of dower, cannot, we think, help the plea. Unless the estate was taken by her while *sui juris* substantially in lieu of dower, the allegation that she entered into it (it being her own already) in lieu of dower cannot avail.

As to the last plea demurred to, it is clearly insufficient. The demandant having entered into the land of which she seeks endowment, whether such entry be lawful or unlawful, cannot be set up as a bar to her right to have dower assigned.

Judgment for demandant.

TALLMAN ET AL., EXECUTORS OF TALLMAN V. THE MUTUAL
FIRE INSURANCE COMPANY OF CLINTON.

Mutual Insurance Companies—Limitation of action—Imprisonment of plaintiff
—29 Vic. ch. 37, sec. 3.

A. insured with a Mutual Insurance Company, by a policy expiring on the 26th June, 1863. The 29 Vic. ch. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the Act, if the loss had happened before, *saving the rights of parties under legal disability*. To a plea that the loss happened before the Act, and that the action was not commenced within one year from its passing, defendant replied that when the Act was passed, A. was in prison (not saying for felony), and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death. *Held*, that the replication was no answer to the plea.

DECLARATION on a Policy of Insurance against fire, dated 10th July, 1858, for \$8000, from June 26th 1858, to June 26th, 1863.

Plea.—That the policy of insurance in the declaration mentioned was made, and the loss and damage therein also mentioned occurred and happened, long before the passing of the Act 29 Vic. ch. 37, intitled “An Act further to amend the law respecting Mutual Insurance Companies in Upper Canada”: that the said Company in the declaration mentioned is a Mutual Insurance Company, within the meaning of the said Act; and that this action was not commenced within one year next after the passing of the said Act, but more than one year after the said passing of said Act had elapsed before the commencement of the action.

Replication.—That by the Statute in said plea pleaded the rights of all parties under legal disability are in all cases saved. And the plaintiffs further say, that at the time the said Act came into force, to wit, on the 18th of September, 1865, the said Daniel Tallman was under legal disability, being in prison, to wit, the public penitentiary of the Province, and that he continued in said prison and under said disability from thence and until the time of his death, to wit, on or about the 21st of February, 1867. And the plaintiffs say, that after the death of the said Daniel Tallman this action was commenced and the writ sued out within a reasonable time, and within the time required by law.

Demurrer, on the grounds, 1. That the imprisonment stated in the said plea is not such a disability as contemplated by said Act. 2. That it is not shewn that the said action was commenced within one year from the death of said Tallman.

W. Eccles, for the demurrer, cited *Piggott v. Rush*, 4 A. & E. 912; S. C. 6 N. & M. 376.

Simpson, contra, cited *Add. Con.*, 2nd ed., 757; *Doe Evans v. Evans*, 5 B. & C. 587; *Sparenburgh. v. Bannatyne*, 1 B. & P. 170; *Maria v. Hall*, 2 B. & P. 236; *Swayn v. Stephens*, Cro. Car. 245; *Hodsden v. Harridge*, 2 Wms. Saund. 64 b; *Chandler v. Vilett*, ib. 120.

HAGARTY, J., delivered the judgment of the Court.

The Statute in the third section provides that no action shall be brought on any policy "already granted or entered into, or that may hereafter be granted or entered into by such Company, after the lapse of one year next after the happening of the loss or damage in respect of which such action or suit is brought, or in the event of such loss or damage having happened before the passing of this Act, then within one year after the passing of this Act, *saving in all cases the rights of parties under legal disability.*"

It is not averred that the assured was a prisoner convicted of felony, and we may of course assume against the pleader that the imprisonment was for misdemeanour only.

Had an action been brought by the assured when so confined in gaol, no plea in abatement or bar could apparently have been pleaded by the defendants. Had the conviction been for felony it could be so pleaded. In *Chitty's Pleading* vol. 1, p. 464, it is said that defendant may plead in abatement to the ability of plaintiff that he or she is an alien enemy, outlawed, attainted of treason or felony, under a *præmunire*, or *feme covert*. See also *Addison on Contracts*, 935; 3 Black. Com. 315.

Bullock v. Dodds (2 B. & Al. 258), contains an elaborate statement of the law. To an action by the plaintiff as endorser of a promissory note, the defendant pleaded that the plaintiff had been duly convicted of felony previous to the

making of the note. After a very elaborate argument the Court held that the attainder of the plaintiff was properly pleadable in bar, and not in disability only; that he had no property in the note and could not sue upon it. It was further said, in reference to the probable effect of a pardon under the great seal (p. 278), that "if such a pardon shall have the effect of enabling the plaintiff to sue upon this bill, it will confer upon him a new right of action, to which our judgment in this case will be no bar."

But in the case before us, as no attainder for treason or felony is shewn, there is and was nothing to prevent an action being brought by the assured at any time before his death. The loss must have happened before the 26th June 1863, when the policy expired. The Act was passed in September, 1865, and for all that appears the assured may not have been in prison till over two years from the loss.

His counsel's argument was, that as he was in prison when the Act was passed, and died there in February, 1867, more than a year after its passing, the right to sue was saved by the Statute, and this almost wholly on the position that as imprisonment of any kind prevented the operation of the Statutes of Limitation, so it would save the right here. Unless we accept this view the case fails.

It is to be observed that by the provisions of our Statutes as to limitation of actions—Consol. Stat U. C. ch 78, sec. 8, as to actions on specialties, and Consol. Stat. U. C. ch. 88, sec. 45, as to real estate—imprisonment is omitted as a disability, and they seem confined to infancy, coverture, *non compos*, or absence from Upper Canada. (a.)

We assume of course that the policy of insurance in this case is a specialty, as the declaration is not fully set out. The Statute of James I. has no application to such a specialty contract, and the Statute of this Province, adopting the provisions of the Imperial Act, 3 & 4 Wm. IV., ch. 42, does not create any exemption in favor of a person imprisoned.

Should the plaintiff's argument prevail, there would be this curious result,—that the assured, being at large after the

(a) This last disability has been abolished by 25 Vic. ch. 20.

loss occurred, and the ordinary Statutes of Limitations running against him, would be after his discharge from prison at any distance of time protected from their operation.

We think the defendants are entitled to judgment.

Judgment for defendants.

McNALLY v. CHURCH.

Dower—Certificate of examination—Proof of residence.

A certificate on a deed executed in 1816, to which the wife of the grantor was not a party, stated that "on the 30th May, 1829, personally came before me, A. F., Judge of the Midland District Court, Mary, wife of the within named Robert McNally," and being examined, &c., consented to be barred of her dower. The grantor was described in the deed as of the Town of Kingston, in the County of Frontenac.

It was objected that the wife did not appear to have been resident in the county when the certificate was given; but, *Held*, otherwise, for the presumption was that she resided with her husband, and that his residence continued the same.

Held, that the 2 Vic. ch. 6, sec. 4, clearly removed any objection, on the ground that she was not a party to the deed. Hunter v. Johnson, 14 C. P. 128, remarked upon.

DOWER.—Henry McNally, the demandant's husband, by deed dated 17th September, 1816, conveyed certain lands now claimed by the defendant. The demandant was not made a party to that deed. The grantor was described as "of the Town of Kingston, in the County of Frontenac, tailor."

On this deed was endorsed a certificate, as follows, "Be it remembered that on this 30th day of May, A. D. 1829, personally came and appeared before me, Alexander Fisher, Judge of the Midland District Court, Mary, wife of the within named Henry McNally, who being examined by me apart from her husband touching her consent to be barred of her dower of the within mentioned land and premises, it did appear to me that she consented thereto freely and voluntarily, without coercion or the fear of coercion on the part of her husband, or any other person."

(Signed) ALEX. FISHER,
District Judge.

After evidence taken there was a verdict for the plaintiff, subject to the opinion of the Court, on the objections taken that the demandant did not appear to have been resident in the county at the time the acknowledgment before Judge Fisher was made, and that the release was not operative unless the wife was a party to the deed.

No evidence was given as to the demandant's residence in 1829, when the certificate was given.

Hector Cameron, for the defendant, cited *Hunter v. Johnson*, 14 C. P., 128; *Monk v. Farlinger*, 17 C. P., 42; *Burns v. McAdam*, 24 U. C. R. 549; *Robinson v. Byers*, 13 Grant, 388.

Moss, contra, cited *Orser v. Vernon*, 14 C. P. 573; *Tiffany v. McCumber*, 13 U. C. R. 159.

The Statutes referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the Court.

The Act 2 Vic. ch. 6, sec. 4, passed in 1839, seems to dispose of the objection that she is not a party to the deed. It makes all acknowledgments taken before any competent authority valid to bar dower, although the wife shall not have joined in the execution of the deed or acknowledged it on the day of the execution of the deed. The clause begins by reciting that it was necessary to legalize the bar of dower where the wife had not been a party to the deed, but had acknowledged the same before competent authority.

We should not have thought this open to question, but that in the case of *Hunter v. Johnson*, (14 C. P. 128), the learned Chief Justice says that the defending a dower suit was unjustifiable, (costs of defence being claimed in an action on covenant for freedom from incumbrance), as, though the certificate on the back of the deed, executed in 1835, shewed the covenantor's wife had released her dower, it clearly appeared that she was no party to the deed. From the report it does not appear that there was any discussion as to the validity of the release of dower, nor is the Statute in any way alluded to either in the argument or judgment.

We therefore do not consider ourselves precluded from considering the effect of the Statute, which we think is conclusive in favor of the defendant on this branch of the case.

The Statute of 1810, 50 Geo. III. ch., 10, under which this certificate was given, provides for her appearing before the Judge of the District Court of the District in which the party resides.

The deed describes Henry McNally as of the Town of Kingston, and County of Frontenac, which we know judicially to have been then part of the Midland District, where the deed was executed and where the certificate was given. (See 38 Geo. III., ch. 5). The Judge certifies that Mary McNally, wife of the within named Henry McNally, appeared, &c. She must have represented to the County Judge that she was the wife of the Henry McNally described in the deed.

We think we must presume, till the contrary is shewn, that she resided with her husband, and there should be no presumption that he changed his residence. On the contrary, the usual rule is that all things continue in a state once shewn until the contrary is proved. At the end of thirty-eight years we think it is reasonably to be presumed against the demandant on this objection.

Judgment for defendant.

SMITH V. BUCHAN ET AL.

Payment by cheque—Laches in presentment, &c.—Pleading—Evidence.

The plaintiff on the 12th January, 1867, gave the defendants \$150 in silver, and \$4.50 for the discount on it, receiving their I. O. U. for \$150 in bills. Afterwards, on the same day, they gave him the cheque of one H. on a Bank, payable to the defendants or bearer, but post-dated to the 16th. It was not presented till the 18th, and was refused there having been no funds since the 16th. H. on the same day told the plaintiff he would make it all right, and the plaintiff in consequence left it at the bank, but on that evening H. made an assignment, having been insolvent for some time. The defendants' shop was closed on the 19th, Saturday, and on Monday the plaintiff returned the cheque to them as worthless, still retaining their I. O. U. The plaintiff having sued on a special count for not delivering the bills, and on the common counts and account stated, it was left to the jury to say whether there was a debt due by the defendants to the plaintiff when the cheque was given, and whether it was accepted in satisfaction; and they found for the plaintiff.

Held, affirming the judgment of the County Court, 1. That the case was properly submitted, and the verdict right.

2. That under a plea of payment the defendants could not set up that the plaintiff by his laches in presentment and notice had made the cheque his own; and *semble*, had this been specially pleaded, the plaintiff on a replication of the facts excusing his delay, would have been entitled to succeed.

APPEAL from the County Court of Wellington.

The declaration contained a special count, alleging that in consideration that the plaintiff would deliver to the defendants certain silver coin, the defendants promised to deliver on demand to the plaintiff bank notes to the value of \$150. Breach, non-delivery. Common money counts and accounts stated were added; and ten pleas were pleaded, including pleas of *non assumpsit*, never indebted, accord and satisfaction by delivering a cheque of a third person to the plaintiff, and payment before action.

The plaintiff had left with the defendants a bag of silver coin, containing \$150. He wanted them to purchase it, but they said they did not then want to do so. The plaintiff said he would leave it with them, and they might use it; and they gave him their I. O. U. for "one hundred and fifty dollars *in bills*," and at the same time the plaintiff paid them \$4.50 for the discount on the silver coin. This was dated 12th January, 1867. Afterwards, on the same day, the defendants gave

the plaintiff the cheque of one William Hockin, father of one of the defendants, for \$150, on the Ontario Bank, Guelph, but post-dated to January 16th, payable to the defendants or bearer. The cheque was not presented till Friday, 18th January. There were no funds available to meet it, either on the 16th or afterwards. William Hockin on the same day told the plaintiff he would make it all right, and the plaintiff left it at the Bank in consequence. On the evening of the 18th William Hockin made an assignment under the Insolvent Act. On the next day, Saturday, the defendants' shop was closed, owing to a death in the family, and on Monday the plaintiff returned the cheque to the defendants as worthless. William Hockin had been insolvent for some time, and had given time for several years on notes to the defendants for a debt due to him by them.

At the close of the plaintiff's case it was objected, amongst other points, that if the plaintiff did not take the cheque in satisfaction, yet by delaying in presenting it till the 18th, and not giving notice till the 21st, he had made it his own and discharged the defendants; and that it must be assumed he took it as cash.

Leave to move for a nonsuit was given, and the case was left to jury, who were asked to find,

1st. Whether there was a debt due to the plaintiff by the defendants when the cheque was given.

2nd. Whether the cheque was accepted by the plaintiff in payment and satisfaction of the debt.

The fact of the I. O. U. remaining in the plaintiff's possession when the cheque was given, and the manner in which the plaintiff dealt with the cheque, was left as matters for their consideration in determining the latter question.

No objections were made to this charge. The jury found both points in the plaintiff's favour.

In the next term a rule *nisi* was obtained for a nonsuit on the leave reserved, on the grounds that there was no evidence on any of the counts, and that the plaintiff was guilty of laches in dealing with the cheque, and thereby made it his own; or for a new trial, for misdirection, and because the verdict was against the weight of evidence.

After argument the learned Judge discharged the rule, and the defendants appealed, on grounds raising substantially the same question, with the addition that the Judge was wrong in holding that the defence on the ground of laches was not available under the plea of payment, or that if necessary he should have amended the record before discharging the rule *nisi*.

Palmer for the appellants, cited *Bayley* on Bills, 6th ed., 214, 229, 230; *Chitty* on Bills, 10th ed., 232, 236, 347; *Story* on Bills, sec. 109; *Tay. Ev.*, 4th ed., p. 42, 43; *Byles* on Bills, 9th ed., 285, 372; *Beeching v. Gower*, Holt 315; *Moule v. Brown*, 4 Bing. N. C. 268; *Camidge v. Allenby*, 6 B. & C. 373; *Redpath v. Kolfage*, 16 U. C. R. 433; *Robson v. Oliver*, 10 Q. B. 715; *Maillard v. Duke of Argyle*, 6 M. & G. 45.

M. C. Cameron, Q. C., contra, cited *Wood v. Stephenson*, 16 U. C. R. 423; *Hitchcock v. Humfrey*, 5 M. & G. 559; *Walton v. Mascall*, 13 M. & W. 452; *Tapley v. Martens*, 8 T. R. 451; *Laws v. Rand*, 3 C. B. N. S. 442; *Byles* on Bills, 23.

HAGARTY J., delivered the judgment of the Court.

Having read carefully the very elaborate and painstaking judgment of the learned Judge of the County Court, we think the merits of the case are wholly with the plaintiff, and that the jury rightly found on the evidence the issues in his favour. It seems to us useless to contend against a liability on one or other of the counts, in the face of the I. O. U. and the payment of the discount by the plaintiff.

The learned Judge reports to us that his charge was not objected to.

We think, after examining the authorities and hearing the careful and very able argument of Mr. Palmer, that on the record as it stands the learned Judge is right; and that if the defendants desired to raise the question that the plaintiff by his dealing with the cheque, as to presentment and notice, had made it his own, so as to operate as payment, they should have so stated it on the record. Had

they done so the plaintiff would probably have been advised to reply as in *Robson v. Oliver*, (10 Q. B. 704) shewing facts to excuse his alleged laches in consequence of the peculiar facts of the case and the position of the defendants and the drawer of the cheque. Such a replication would most probably have been found by the jury in favour of the plaintiff, and so the defendants have suffered no substantial injury from the state of the pleadings.

We do not deem it necessary to review all the cases (not very uniform as they are) bearing on the alleged laches. This Court, in *Wood v. Stephenson* (16 U. C. R. 423) in 1859, said, "As to cheques on bankers, given as this was in payment, the want of due presentment or of notice to the drawer is of no consequence, unless when the banker on whom it is drawn has become insolvent." This was an action against the drawer of the cheque.

According to the finding of the jury, which we think right on the issues and evidence, the only plea on which the defendants could hope to urge the alleged laches of the plaintiff, would be that of payment. The cheque here is properly found to have been given on account of the debt. This on the authorities is considered a conditional payment, absolute if paid, liable to be defeated if unproductive of payment. Byles, J. says, in *Bottomley v. Nuttall* (5 C. B. N. S. 148) "It is the first learning that taking a bill for and on account of a debt does not operate as an absolute discharge of the debt. At the most it is only a conditional payment, which is defeated by the subsequent dishonor of the bill, whether total or partial."

We can find no case in which, when payment had not been in fact obtained, any collateral matter, such as making the cheque or bill his own by laches, has been attempted to be given in evidence under a general plea of payment. As Pollock C. B. says in *Griffiths v. Owen* (13 M. & W. 64) "To an action for a money demand the debtor may plead payment, and therefore ought to be allowed to plead also anything which is equivalent to payment, and which the parties at the time agreed should be considered as payment."

In *Robson v. Oliver* (11 C. B. 205) the law is reviewed by Maule J. in reviewing the cases he cites approvingly the expressions of other Judges, that bills, &c., taken on account of a money demand or note operate as a conditional payment, "and may be so pleaded." *Robson v. Oliver*, already cited, is an example of the ordinary way in which facts such as appear in this case are pleadable. We can hardly conceive that the facts there set out at length could have been relied on by the defendants under a general plea of payment.

In *Maillard v. The Duke of Argyle* (6 M. & G. 45) Maule J. says, "Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises. When you speak of paying in cash, that means in satisfaction * * You may support a plea of payment by shewing that a person agreed to accept a horse from another in satisfaction, and the same as to goods, provided the agreement was, to take the articles *as money*."

On the whole, we agree with the learned Judge below as to the effect of the issues, and the questions which on them it was proper to submit to the jury. His charge was not objected to, and we think the finding was proper, and decisive in the plaintiff's favour.

It may be, as was suggested, that the form of the issues was not prominently pressed by the plaintiff at the trial, but we find on the transcript of the proceedings, that after the defendants' objections were recorded Mr. Cameron, the plaintiff's counsel, urged that "it was matter of fact for the jury to say if the cheque was taken by way of payment or accord and satisfaction." This was putting the plaintiff's case on the actual issues as raised, without reference to the alleged laches.

We think we should not intend anything in favour of the defendants on the facts disclosed in evidence. The decision of the jury we consider fully supported by the evidence, and it is upheld by the learned Judge on grounds at least technically correct as the issues are framed.

We dismiss the appeal with costs.

Appeal dismissed.

FAIRBAIRN V. HILLIARD.

*Agreement—Construction—Lease or sale—Payment of rent to mortgagee—
General averment of performance of conditions.*

Defendant signed the following memorandum, "I agree to pay S. M. Fairbairn," (the plaintiff), "£50 cy., for his right to the house I live in, the farm at present occupied by me, known as the Morrison farm, and the stables now used by me, for six months from the 1st April next."

Held, evidence of a letting by plaintiff to defendant, not of a sale. One L., who held a mortgage on the premises, executed and overdue before the lease, notified defendant to pay the rent to him instead of to the plaintiff, threatening distress and ejectment on default. Defendant thereupon attorned to L., and paid him the £50. *Held*, that such payment constituted a good defence to an action by plaintiff against defendant for the rent.

If the memorandum had shewn a sale, so that the plaintiff would have been bound to tender a conveyance—*Semble*, that such tender must have been alleged in the declaration, and would not be included in the general averment that "all things happened," &c., for such averment covers only conditions precedent to be performed by plaintiff under the agreement.

DECLARATION.—First Count.—That the plaintiff let to the defendant a farm known as the "Morrison farm," being, &c., (describing it), together with the house and stables therewith used and enjoyed by the defendant, for the term of six months, to hold from the first day of April, 1866, at and for the price and sum of £50 for such term, all of which rent is due and unpaid.

Second Count.—For money payable by the defendant to the plaintiff, for the defendant's use by the plaintiff's permission of messuages and lands of the plaintiff.

Third Count.—For that the defendant was in possession of a house and farm, and stable, to which the plaintiff claimed to be entitled, and the plaintiff had brought an action of ejectment in the Court of Common Pleas for Upper Canada, against the defendant, for the recovery of the possession of the said house, farm, and stable; and the defendant, in consideration that the plaintiff would forbear proceedings in the said action, promised to pay the plaintiff £50 for the plaintiff's right to the said house, farm, and stable, for six months, from the first day of April, 1866; and all things happened necessary to entitle the plaintiff

of the said £50, yet the defendant did not

By expressions second count, never indebted.

2. 3^d of a 1st and second counts: that the sums of money claimed in the first and second counts of the declaration are one and the same, and for the same occupation of the same premises, and that before the demise mentioned in the declaration and before the plaintiff had anything in the premises, the William Snyder, being seized in fee of the premises, by indenture of bargain and sale mortgaged them in fee to the William Lundy, securing the payment of the money on a specified day: that default was made in such payment, and the money still remained unpaid: that the equity of redemption in the premises came to the plaintiff, who being in possession of the premises, and having no other estate or interest in them as aforesaid, made the demise of them to the defendant in the first count mentioned, who entered into possession by virtue thereof: that afterwards, on the 19th of May, 1866, the said William Lundy gave notice of the several premises to the defendant, and required him to pay the said rent in the declaration mentioned to him as mortgagee, instead of the plaintiff, and demanded payment thereof from the defendant, and threatened in case of non-payment to distrain or sue for the said rent, or bring an action of ejectment to recover possession of the said house, farm, land, and premises, with the appurtenances, in the defendant's possession, or otherwise put the law in force as he might be advised, and the said William Lundy was then about to put the law in force for the recovery of the said rent, and to compel payment thereof to him, wherefore defendant was then compelled to attorn and become tenant of the said premises to the said William Lundy, as such mortgagee, all which occurred before the commencement of this suit; and the defendant afterwards, and after the commencement of this suit, did necessarily and unavoidably pay the said William Lundy as such mortgagee the said rent.

3. To the third count: did not promise as alleged.

4. To the third count: payment after suit.

The plaintiff took issue on all the pleas.

This action was commenced on the 11th of June 1866.

At the trial this memorandum was proved to the effect that the plaintiff was to pay S. M. Fairbairn £50 cy., for his right to use I live in the farm at present occupied by me, the Morrison Farm, and the stables now used by six months from 1st April next.

Peterborough, 19th March, 1866.

(Signed) GEORGE HILLIARD

The following instrument was also put in and proved.

A mortgage by Snyder to Lundy, dated 7th April 1857, of these premises, to secure payment of £170 18s. 6d. on the 1st January, 1857.

A deed poll, dated 14th March, 1851, from the Sheriff of Peterborough, in consideration of \$20, conveying to the plaintiff all Snyder's estate, right and title in the premises, sold under a *Venditioni Exponas*, at the suit of *Seymour et al. v. Snyder*.

A notice dated 19th May, 1866, to defendant, signed by Robert Dennistoun as attorney for William Lundy, stating the mortgage and requiring payment to Lundy of all rent and arrears due and to accrue due, and threatening distress, or suit for such rent, or ejectment, in case of default, or otherwise to put the law in force as he might be advised.

An attornment, dated 25th May, 1866, signed by defendant, endorsed on the notice by Lundy to the defendant.

It was admitted that the plaintiff on the 16th of March, 1866, commenced ejectment against the defendant, and served process on the 17th March on the defendant, being then in possession, and that the suit was not further prosecuted.

All these facts were proved or admitted, and that defendant paid the rent, £50, to Lundy, on the 25th of January, 1867, and that that sum was all that was paid on the mortgage.

The learned Judge told the jury that the agreement produced and admitted was not a lease, but a sale of the plaintiff's right in the premises for six months as therein mentioned; and that the defendant was not by any act of

Lundy, the mortgagee, compelled to attorn to him, and that the act was voluntary on the defendant's part. This was objected to by the defendant's counsel, and the plaintiff had a verdict for £50.

In the following term a rule *nisi* was obtained to set aside the verdict as being against law and evidence, in this, that there was a demise to the defendant by the plaintiff, and payment to the mortgagee was a good defence: that the count setting up a sale was not supported, and even if there were a sale, no conveyance was proved or tendered, or readiness averred or proved to convey the plaintiff's right; and for misdirection in charging as above noted, and for not leaving it to the jury to say whether on the facts the transaction between the parties was a lease; and to arrest judgment on the second count, no conveyance or tender of conveyance, or readiness to convey, being averred. This rule was discharged, and the defendant appealed.

McMichael, for the appellant, cited *Roberts v. Brett*, 18 C. B. 561; S. C. in Error, 6 C. B. N. S. 611, S. C. 11 H. L. Cas. 337, 11 Jur. N. S. 377.

C. S. Patterson, contra, cited *Early v. Garrett*, 9 B. & C. 928; *Spratt v. Jeffery*, 10 B. & C. 249; *Kintrea v. Perston*, 1 H. & N. 357; *Cooper v. Parker*, 14 C. B. 118; S. C. in Error, 15 C. B. 822; *Longridge v. Dorville*, 5 B. & Al. 117; *Edwards v. Baugh*, 11 M. & W. 641; *Moberly v. Baines*, 15 U. C. R. 31; *Freme v. Wright*, 4 Madd. 364; *Bentley v. Daves*, 9 Ex. 666.

HAGARTY, J., delivered the judgment of the Court.

We find great difficulty in acceding to the view taken in the Court below. It was held that the agreement produced shewed a sale of the plaintiff's interest, and not a lease. A sale of a man's right to premises for six months from a day named for a fixed sum, is not easily distinguished from a lease or demise for the period named at a fixed rent. The memorandum is only signed by the defendant, and all to be done is by him; the plaintiff in writing binds himself to nothing. The defendant was in possession. No provision

is made for a conveyance of the alleged right, nor does it say (viewed as a sale), when the price named is to be paid. If it provided for a sale then no actual interest passed from the plaintiff to the defendant, nor, if the other difficulties could be surmounted, is there any averment of a tender of a conveyance or even of a readiness to convey, nor was there any evidence thereof by the plaintiff. As a question of construction we think we must hold that the memorandum is only evidence of a letting or demise by the plaintiff to the defendant, or rather of an acceptance of a letting and tenancy by the defendant, of premises for six months from the 1st April, 1866, at the rent of £50. Any other construction seems to involve insuperable difficulty, and the right principle seems to be to give it such a construction as is sensible and capable of being enforced.

We do not agree with Mr. Patterson that the general averment that "all things happened," &c., can supply the absence of such essential averments in pleading as those objected to by the defence. That averment, we think, only covers conditions precedent to be performed by the plaintiff under the agreement or deed. But the view we take renders this of little moment.

Regarding the agreement as shewing a demise, then we have to consider if the notice by the mortgagee, Lundy, and the attornment by defendant to him, constitutes a defence.

The law on this subject is fully summed up in the notes to *Moss v. Gallimore*, (1 Sm. Lea. Cas. 567, 6th ed.)

In the present case notice was given by the mortgagee, Lundy, threatening ejectment or distress, and the defendant attorned to him, all before any rent became due. Some difficulty has arisen in cases where rent was claimed by the mortgagee in arrear before he gave notice.—See *Wilton v. Dunn* (17 Q. B. 295); but we have not to deal therewith here.

In *Hickman v. Machin*, (4 H. & N. 716), Pollock, C. B., says: "It has been decided that a mere notice amounts to nothing; it is no answer to an action on the contract between the landlord and the tenant. Coupled with attorn-

ment it is in substance equivalent to eviction, because the tenant is not bound to resist; and in such case the tenant may plead eviction."

The only doubt suggested may be, that here the rent was paid after action and before plea. But we do not find any direct authority to shew that this alone can destroy the defence. There is no suggestion or pretence that the whole proceeding between Lundy and defendant was other than *bonâ fide*, and it seems impossible to hold that after notice and attornment under compulsion, the mortgagee's right to obtain accruing rent can be destroyed by the possibility of the mortgagor issuing process against the tenant the day after the rent fell due, which the tenant may be ready to pay and did pay to the mortgagee on the next subsequent day. In the present case substantial justice will be done, as the amount paid by defendant to the mortgagee will go in reduction of the mortgage debt.

We think the rule should be absolute in the Court below to set aside the verdict, and for a new trial without costs.

Appeal allowed.

CRASKE V. HUFFMAN ET AL.

Deed—Construction—Agreement as to use of water.

M. conveyed to W. certain premises "together with the privilege of using the water in the pond for the purpose of manufacturing cloth and otherwise howsoever, when and at all times when water is and remains in said pond sufficient for the driving and running the machinery of a grist-mill, the property of the grantor, and the fulling and carding-machine hereby sold to said W." M. covenanted that W. should have the privilege of using the water for said purpose "when and at all times when water is and remains in said pond sufficient for the driving and running the machinery of a grist-mill, the property of said M. and the said fulling and carding machine hereby sold to said W. Provided always, that when and whenever there is a scarcity of water in the said mill pond the said W. shall be at liberty to use only so much of the water in the said pond as shall be sufficient to turn one water-wheel."

Held, that M. was entitled to sufficient water to drive his mill before the defendant could use any; and that the defendant was not by the proviso entitled at all events to enough to turn one water-wheel.

SPECIAL CASE.

Clarissa Marsh owned in fee simple that part of lot 3, in

the 5th concession of Sidney, of which the factory and premises owned by the defendants, and the grist-mill and premises occupied by the plaintiff, formed part.

On the 19th August, 1848, she conveyed by deed to one John Platt Williams a certain factory and premises, "together with the privilege of using the water in the said pond for the purpose of manufacturing cloth and otherwise howsoever, when and at all times when water is and remains in the said pond sufficient for the driving and running the machinery of a grist-mill the property of the grantor, and the said fulling and carding machine hereby bargained and sold to the said John Platt Williams, his heirs and assigns."

In said deed was also a covenant on her part that the grantee "shall have the privilege of using the water in the said pond for the purpose of driving the machinery for fulling, carding, and manufacturing cloth, and otherwise howsoever, when and at all times when water is and remains in the said pond sufficient for the driving and running the machinery of a grist-mill, the property of said (the grantor) and the said fulling and carding-machine hereby bargained and sold to the said (the grantee) his heirs and assigns. Provided always, that when and whenever there is a scarcity of water in the said mill-pond, the said (the grantee) shall be at liberty to use only so much of the water in the said mill-pond as shall be sufficient to turn one water-wheel."

At the execution of this deed, and at the commencement of this suit, the grist-mill occupied by the plaintiff existed, containing two run of stones.

The plaintiff represented Clarissa Marsh, and the defendants represented the grantee in that deed.

The plaintiff insisted on his right to the use of the water to drive two run of stones in his grist-mill, and that the defendants could only use the surplus water after the plaintiff's mill was so supplied.

The defendants argued that, on the whole construction of the deed, he was entitled to enough water to turn one water-wheel.

At the trial, at Belleville, before Richards, C. J., a verdict was taken for the plaintiff for \$100, subject to the opinion of the Court upon a case, of which the above are the material facts.

John Bell (of Belleville) Q. C. and *Moss* for the plaintiff, cited *Shep. Touch.* 122.

Read Q. C. and *Diamond*, contra, cited *McDonald v. McGillis*, 26 U. C. R. 458 ; 2 Co. 24 a, 71 b. ; *Co. Lit.* 203 b ; 3 Lev. 305 ; *Com. Dig.* Condition A. 2, E ; *Rowbotham v. Wilson*, 8 H. L. Cas. 362 , *Broom Leg. Max.* 487 ; *Platt on Covenants*, 36.

HAGARTY, J., delivered the judgment of the Court.

The grant is very loosely worded. The defendants may use water when water is and remains in the pond sufficient for driving the plaintiff's mill and the fulling and carding-machines sold to the defendants—that is, when there is enough water for both these purposes. Then comes the proviso, that when there is a scarcity of water the defendants shall use only as much as will be sufficient to turn one water-wheel.

Now, without this proviso the plaintiff's argument would be clear. Does it enlarge the grant to the defendants, or extend the meaning of the words previously used ?

We have no doubt but that the framer of the deed meant not to enlarge but to restrict the defendants' right, whether the words used by him support that intent or not.

It seems quite useless to discuss any technical point such as was suggested in argument, as to a proviso enlarging the estate conveyed by the grant. We have here to extract from all the words used their meaning, if it be possible so to do.

It would be utterly repugnant to all the preceding part of the deed, if the defendants are entitled by this proviso to take enough to turn one water-wheel, whether there be enough for the plaintiff's use or not. Such a construction would completely reverse the meaning of the grant, and instead of giving the plaintiff the first right to the water,

and the surplus after supplying such right to the defendants, it would give the first right to the defendants, and the surplus after the defendants' one wheel was supplied to the plaintiff.

Very unmistakeable words ought to be required to have this effect.

It is quite true that, assuming the general intent of the deed to be as the plaintiff argues, the adding of this proviso creates the whole difficulty. Had the word "only" been omitted the argument of the defendants would be very strong, and it would probably be then held as an absolute right when there was a scarcity of water to use so much as would turn one wheel. Had there been a previous grant of a general use of the water for the fulling-mill, the proviso would be quite intelligible as restricting the use in time of scarcity to one wheel.

The words "when there is a scarcity of water in the mill-pond," are much more vague than if it had been, "when the water is not sufficient to drive the plaintiff's mill and the defendants' also."

We do not feel at liberty to hold that the former words are equivalent to the latter. We think the sounder construction to be that they only point to times or seasons of low water generally, when difficulties in supplying both mills might possibly be anticipated, and with this view it was provided that at such periods the defendants should only seek for enough for one wheel, to avoid possible disputes, leaving the general priority of the plaintiff's right to the first use of the water untouched.

We see no alternative between such a construction and the nullifying of all the preceding parts of the deed, and a complete alteration in the nature of the thing granted.

We think the plaintiff should have the *postea*.

Judgment for the Plaintiff.

TRUST AND LOAN COMPANY OF UPPER CANADA V. COVERT
AND RUTTAN.*Covenants for title—Defects known to vendee—Equitable pleading.*

Action on covenants for seisin and right to convey, contained in a deed by the defendants to one F., who had conveyed to the plaintiffs. Plea, on equitable grounds, that the conveyance to F. was voluntary, and he knew when the defendants executed it that they were not seized, and had not the right to convey; and the plaintiffs were aware of these facts when F. conveyed to them. *Held*, on demurrer, no defence, for such covenants are not in equity confined to defects unknown to the vendee.

The plaintiff replied equitably, that F's deed to the plaintiffs was a mortgage, to secure money then lent to him by them, and defendants conveyed to F. for the express purpose of enabling him to execute such mortgage and obtain the loan, and the plaintiffs were induced to lend by their reliance on defendants' covenants, as the defendants well knew. *Semble*, that if the plea had been good, the replication would have been an answer to it.

DECLARATION.—That defendants conveyed certain lands to one Thompson, and thereby covenanted for their being then duly seized in fee simple, without encumbrance, &c., and for right to convey: that Thompson afterwards for value conveyed said land and his estate therein to the plaintiffs.

Breach: that neither defendants, nor either of them, were seized in fee, nor had they right to convey, &c., whereby the plaintiffs have lost the consideration money paid by them to Thompson.

Plea, on equitable grounds, by the defendant Ruttan, that the alleged deed of the defendants was a voluntary deed, and was made without any value or consideration for the making thereof, and the said Thompson before and at the time of the making of the said deed well knew that the defendants were not, and that neither of them was seized of the said estate in fee simple in the said lands, and that the defendants had not, and that neither of them had good right, full power, or lawful or absolute authority to grant, sell, alien, convey or confirm the said lands, in manner and form in the said covenant contained; and the plaintiffs had full knowledge of all the matters in this plea set forth before and at the time of the conveyance of the said lands to them by the said Thompson.

Replication, on equitable grounds, that the said deed of the said Thompson to the plaintiffs was and is a mortgage of the said lands, made by the said Thompson by way of security for a large sum of money at the time of the making thereof lent and advanced by the plaintiffs to the said Thompson, which said sum was before the commencement of this action and still is overdue and wholly unpaid. And the plaintiffs say that the defendants made their said deed, and entered into the said covenants, for the express purpose of enabling the said Thompson to make the said mortgage, and thereby to procure the said loan from the plaintiffs, and the said plaintiffs were induced to lend the said sum of money to the said Thompson by their reliance upon the validity and sufficiency of the said covenants, and but for the existence of such covenants the plaintiffs would not have made such loan, of all which facts the defendants had full notice and knowledge before the plaintiffs had paid over the said loan to the said Thompson.

The plaintiffs also demurred to the plea, and the defendants joined in demurrer and excepted to the replication.

Moss, for the demurrer, cited *Hall v. Palmer*, 3 Hare 532; *Fletcher v. Fletcher*, 4 Hare 67, 74; *Dawson v. Kearton*, 3 Sm. & G. 186; *Clough v. Lambert*, 10 Sim. 174; *Lomas v. Wright*, 2 M. & K. 769; *Watson v. Parker*, 6 Beav. 283; *Alexander v. Brame*, 19 Beav. 436; *Vane v. Lord Barnard*, *Gilb. Equ. Cas.* 6; *Levett v. Withrington*, *Lutw.* 317.

C. S. Patterson, contra, cited *Ogilvie v. Foljambe*, 3 Mer. 53; *Co. Lit.* 384 *a*, note; *Dart, V. & P.*, 3rd ed., 510; *Rawle on Covenants for Title*, 2nd ed., 155; *Sug. V. & P.*, 13 ed., 462; *Savage v. Whitebread*, 3 Chy. Rep. 14; *Ex parte Collins*, 2 Ir. Chy. Rep. 618; *Woollam v. Hearn*, 2 White & Tud. *Lea. Cas. Equ.* 440.

HAGARTY, J., delivered the judgment of the Court.

The point presented by the defendants is this: that covenants for title and right to convey are in equity restrained

in their operation to defects unknown to the vendee, and that for any known defect the covenant is useless. To the bulk of vendors and purchasers, unacquainted with such subtleties, this must be a very startling proposition. One very elementary rule of law would apparently be at once opposed to it : viz. that the written instrument shewed the true contract and agreement of the parties, and that, in the absence of fraud or mistake, parol evidence should not be resorted to, to limit its plain expressed words.

The authority relied on seems to have its origin in a case of *Savage v. Whitebread*, (3 Chancery Reports, or Reports in Chancery, 14) decided in 20 Car. II., by Sir Orlando Bridgman, the Lord Keeper. After reciting the facts of covenant for freedom from incumbrances and collateral security on other lands also, and the purchaser having entered on the security for damnifications, the bill was to have the collateral security reconveyed ; “ whereto defendants having set forth divers encumbrances on the purchased land, and (*inter alia*), a lease of twenty-one years of parcel thereof, the plaintiff replied generally ; and at the hearing a reconveyance was ordered on satisfaction of the damnifications ; and upon the report the plaintiff excepted against the lease, that it was no incumbrance, because they had proved the purchaser had notice of it at the time of the purchase ; whereto defendant insisted that the notice was not in issue in this case ; yet Lord Keeper Bridgman would not conclude the infant by a slip of her counsel in not putting it in issue upon the replication, but ordered a trial, whether the purchaser agreed to take the land charged with the lease.”

Mr. Rawle, in quoting this case, gives in a note the not very flattering opinion of the Lord Keeper as an Equity Judge taken from Lord Campbell's *Lives of the Chancellors*, where it is said, (Vol. III., page 280,) that “ though very desirous to do what was right, he gave universal dissatisfaction to the parties, to the profession, and to the public.” (*Rawle on Covenants for Title*, 154.)

Rawle's own remark seems very pertinent “ It certainly has been very often argued that the defect being known, it

was understood that the covenants were not to extend to it; but it is difficult to see how such an argument could prevail in opposition to the general rule, that nothing within the terms of a deed can be excepted from its operation by parol."

Sir William Grant says, in *Ogilvie v. Foljambe*, (3 Mer. 65.) "Even in cases where there has been a covenant against encumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against encumbrances of which he had express notice." This, as Mr. Rawle adds, "was probably in reference to *Savage v. Whitebread*."

Butler, in a note to *Co. Lit.* 384, *a*, states it thus, "It has been argued that," &c., expressing no opinion of his own.

Platt on Covenants, 387, merely mentions it thus: "It has been sometimes doubted whether," &c., citing *Ogilvie v. Foljambe*.

Dart's V. & P. 510, refers to it in the same manner as a doubtful point.

Bythewood's Conveyancing, Vol. IX. page 381, says "It is a correct, though not a new observation, that the covenants for title ought never to be relied on as affording protection against an incumbrance of which the purchaser has notice; for it seems to be doubtful whether they would extend to such an incumbrance," citing, in addition to those already noticed, *Vane v. Lord Barnard* (*Gilbert's Equity Cases* 6, T. T. 7 Anne).

This case shewed articles in consideration of marriage to settle lands, and that in the settlement there should be covenants of seizin, right to convey, and that the trustees should enjoy free from encumbrances. The lands had been previously charged by the settlor. The bill was for a specific performance of the articles, by the defendant, the settlor, paying off the encumbrances or otherwise giving security. The Chancellor said, "The parties seemed to be satisfied with a bare covenant only, and the marriage articles were only a covenant to covenant; so that inserting that covenant in the future settlement was a specific performance of

those articles * * * Notice or no notice of this encumbrance was very material in this case, for where a covenant is in this manner, if any encumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, that encumbrance shall be discharged, even before sealing the deed of settlement, both upon account of the fraud in concealing such encumbrances, and because it would be needless to enter into a covenant which before entering into is already known to be broken; but against all other encumbrances discovered afterwards there is the party's covenant only. Now when you have notice of an encumbrance before executing the articles, it is a stronger case than the last, for you consent with your eyes open, to accept the party's covenant against an encumbrance you were aware of, and when you have chosen your method of security yourself, this Court will give no other, nor make the party do a further act than by the articles he agreed to do." And it was decided that the defendant should execute a deed of settlement with covenants exactly pursuant to the articles only.

This case does not decide the point, as the defendant was ordered to enter into the covenants generally as he had agreed to do. The Court refused to make him discharge or give further security for the known encumbrance.

In *Sudgen's V. & P.*, 14th ed., 573, it is noticed thus, "Where a purchaser consents to take a defective title, relying for his security on the vendor's covenants, the agreement of the parties should be particularly mentioned, and unless the objections to the title appear on the face of the conveyance, the covenants to guard against it should be entered into by a separate instrument"—citing Butler's note, *Savage v. Whitebread*, and *Ex parte Collins*, 2 Ir. Chy. R. 618.

This latter case is the most directly in point of all that have been referred to. It was objected that the assignee of a policy of insurance, with covenant for good right to assign, having notice of the defect in the title of the assignor, could not enforce the covenant as to such defect.

A deed dated 1st November, 1827, created a prior charge, if effectual. The Master of the Rolls (Smith, a very acute lawyer), after argument, in which *Savage v. Whitebread* and many other cases on other points of the suit were referred to, said, p. 630, "I confess I do not understand upon what principle the Court is to be called on to construe the covenant by reference to the fact of whether there was or was not notice of the deed of 1st November 1827." He proceeds to say that upon the evidence he thought the assignee had not express but constructive notice thereof, and proceeds "But I do not understand how constructive notice of such deed is to qualify or control the express terms of the covenant for title. If therefore it were necessary to decide this question, I should have no difficulty in deciding it against the petitioners."

Such is a summary of the state of the authorities on this subject.

We are strongly of opinion that to adopt the view of the defendants would be to unsettle and endanger the security hitherto supposed to be enjoyed under covenants for title or right to convey, &c. We share the difficulty felt by the Master of the Rolls in acknowledging that such a defence can be urged to an express covenant.

In the absence of fraud, mistake, or surprise, we do not see the principle on which any Court admits parol evidence to explain away or reduce to uselessness a clearly expressed contract under seal.

We think the defence fails, and that our judgment must be against the plea. The point as to the plaintiff's vendor being a volunteer was substantially abandoned. The cases shew clearly that there is nothing in this point.

We do not think it necessary to discuss the equity raised by the replication. It probably would be held sufficient to displace that raised by the plea.

Judgment for the plaintiffs.

TAYLOR V. McEWAN.

Sheriff—Action for escape—Proof of debt—Measure of damages—Right to proceed in original suit.

In an action against the Sheriff for a voluntary escape of M., arrested on a *capias* endorsed to take bail for \$150, it appeared that the defendant had permitted M. to go on his depositing \$175, and that the plaintiff had afterwards proceeded with the suit, and entered final judgment in it for his damages, assessed on judgment by default, and costs, about \$270.

Held, reversing the decision of the County Court, that such judgment was clearly evidence as against the Sheriff of the debt due by M. to the plaintiff.

Semble, that the plaintiff was entitled, under the C. L. P. A., to proceed in the original suit to judgment after M. had escaped; but if the judgment had been irregular on that ground, *Quære*, whether the Sheriff could raise the objection; and *Held*, that while unreversed the judgment was at least *prima facie* evidence against him.

Held, also, affirming the judgment below, that the measure of damages was only the sum sworn to (\$150) and costs up to the time of the escape, not the amount recovered in the suit.

Jonas v. Tepper, 28 L. J. Q. B. 85, followed on this point, in opposition to earlier cases.

APPEAL from the County Court of Essex.

Declaration, that one Merritt was indebted to the plaintiff, and a Judge's order was obtained, on which a writ issued to hold him to bail in \$150, and was delivered to the defendant as Sheriff endorsed for bail for that sum: that the defendant arrested Merritt on the writ, yet without the plaintiff's assent allowed a voluntary escape: that no special bail was put in, and the plaintiff was thereby delayed in the recovery of his debt and the costs of bringing the action, and is likely to lose the same, &c.

Pleas.—1. Not guilty. 2. That Merritt never was indebted as alleged.

At the trial it was proved that the writ was delivered to the Sheriff on the 7th August, 1866, and returned "I have the body,—I have executed the writ."

An exemplification of the judgment in the suit was put in; shewing judgment by assessment against Merritt, signed 6th October 1866, for \$189.26 damages, and \$78.78 costs. It was objected that this exemplification of judgment did not prove the debt as against this defendant.

It was then proved that Merritt was four days in the defendant's custody, and that the defendant said he afterwards let him go on depositing \$175 in money.

The plaintiff admitted that the defendant had paid him \$150 before action.

The defendant was called. He swore he did not let Merritt go till he paid the \$175: that he had tried on the execution to make more out of him by seizure of some stock, but it was claimed by another: that he was ready to pay over the \$25. It was proved that special bail was not put in.

For the defendant it was objected that the Judge's order was not proved: that proceeding to judgment and execution waived all claims on the Sheriff: that the Sheriff should have been ruled to bring in the body: that no debt was proved; and that all the Sheriff could be liable for would be the costs up to the time of the escape, having paid the amount sworn to.

The learned Judge overruled the objections, and ruled that the plaintiff would be *prima facie* entitled to a verdict for the amount of his judgment and costs in the original suit, provided it did not exceed the penalty in the bail bond.

It was then agreed that there should be verdict for the plaintiff for \$126.04; with leave to the defendant to move to enter a verdict for the defendant, or to reduce the damages to such an amount as the Court might think proper, or for a new trial, if the plaintiff was not entitled to more than the costs incurred at the time of escape, to be taxed.

A rule was granted next term embodying the leave and all objections taken, but not asking for a new trial.

The learned Judge directed the *postea* to be delivered to the defendant, holding that the debt was not proved: that the judgment was *res inter alios acta*, the Sheriff being a stranger to it: that it was by default, and at most a mere admission by Merritt, and that such admission, made after the escape, would not avail against the Sheriff: that it might be a question whether the judgment was not irregular, if not void, as the plaintiff could not proceed by default

after the escape. He held that the value of the custody was clearly the amount of debt, \$150, as sworn to, and costs incurred to the time of escape, for Merritt had deposited \$175, of which the Sheriff had paid \$150, and was ready to pay the remaining \$25, which the defendant refused, insisting on the whole amount of his verdict and costs. The Judge refused to remould the rule and grant a new trial.

The plaintiff appealed, objecting to these rulings, and that a new trial should have been granted.

C. Robinson, Q. C., for the appellant, cited *Brown v. Paxton*, 19 U. C. R. 441; *Kingan v. Hall*, 24 U. C. R. 248; *Kinloch v. Hall*, 25 U. C. R. 141; Rule of Court T. T. 1856, No. 89; Har. C. L. P. A. 633, 54; Ch. Arch. Prac., 12th ed., 828, 869; *Macrae v. Clarke*, L. R. 1 C. P. 403; *Regina v. Sheriff of Hastings*, 1 Chamber Rep. 230; *Jonas v. Tepper*, 28 L. J. Q. B., 85; *Savage v. Jarvis*, 8 U. C. R. 331; *O'Reilly v. Moodie*, 4 U. C. R. 266.

Harrison, Q. C., contra, cited, *Alexander v. Macauley*, 4 T. R. 611; *White v. Jones*, 5 Esp. 160; *Rogers v. Jones*, 7 B. & C. 89; *Gibbon v. Coggon*, 2 Camp. 188; *Parker v. Fenn*, 2 Esp. 477, note; *Sloman v. Herne*, Ib. 695; C. L. P. A. secs. 28, 29, 34, 57.

HAGARTY, J., delivered the judgment of the Court.

We think the direction wrong as to the proof of debt. All the cases cited were before judgment, when the debt had of course to be proved if denied. So under the old practice it would always be, on escape from *mesne* process, as if no bail were put in, the plaintiff could not proceed to judgment. But here the production of the judgment was in our opinion undoubted evidence, and the best evidence, against the Sheriff. All the objections urged to its reception would equally apply to actions against Sheriffs for false returns or escapes on final process.

It is then urged that the judgment here was irregular, or a nullity, as the Common Law Procedure Act does not provide for proceeding to judgment by default where the defendant escapes.

The exemplification is not before us. We are told judgment was "by assessment." It is very doubtful if the Sheriff can be heard to object to a judgment for any irregularity. The case cited of *O'Reilly v. Moodie* (4 U. C. R. 266) is against his being allowed "to set up all technical objections in regard to forms of action and points of practice," as is there said.

We are not prepared to hold that a plaintiff cannot proceed after escape on *mesne* process. Sec. 29 directs service of a copy of the process at the time of the arrest; and sec. 30 that "such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned; and subsequent proceedings, whether after an arrest and service or service only, shall, in all the Courts, be according to the practice in force in the Superior Courts of Common Law in like cases." Sec. 56 provides for proceeding when the writ of summons is not specially endorsed. Sec. 51 speaks of the defendant appearing according to the warning on the writ of *capias*. If the service of the copy of the *capias* is, by sec. 30, to be of the same force and effect as the service of the writ of summons, and subsequent proceedings, whether after arrest and service or service only, are to be according to the practice of the Courts, it would not be a straining of the Act to hold that a plaintiff, when the defendant has escaped before putting in bail, might proceed, treating the service of the *capias* as a summons, and the arrest as collateral to the ordinary proceedings in a suit commenced by summons.

But we do not feel it absolutely necessary to decide this question. While the judgment stands unreversed it is at least *primâ facie* evidence against the Sheriff.

As to the measure of damages, we are inclined to agree with the ruling in the Court below, that the measure should be the sum sworn to and the costs. The form of special bail would seem to point to a much wider liability, the costs and condemnation money in the action being spoken of. But from an early date we find that the bail to the action were relieved, on application to the Court, on payment of, the sum sworn to and costs,

Clarke v. Bradshaw, (1 East 90) was a case where bail to the action were relieved on payment of the debt sworn to and all costs, although judgment had been recovered for a much larger sum.

Our rule of Court 89, copied from the English rule 109 of Hilary Term, 1853, provides that "Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance."

Jonas v. Tepper, (28 L. J. 85, Q. B.) was a case where by error in the Judge's order a lesser sum was inserted than that sworn to, and the *capias* endorsed accordingly. Bail to the Sheriff was given for the smaller sum. Application was made to discharge the bail on payment of this sum and costs. It was referred by Erle J. to full Court, who held that "the amount of liability of bail is now governed by rule 109 of H. T. 1853 * * * * The sum sworn to must be taken to mean the sum mentioned in the Judge's order to hold to bail, and endorsed on the *capias* accordingly"; and the application was granted.

There are several earlier cases apparently opposed to this, to the effect that the bail to the Sheriff are liable for any amount ultimately recovered, up to the penalty in the bond; such as *Mitchell v. Gibbons* (1 H. Bl. 76), *Stevenson v. Cameron* (8 T. R. 28). In *Heppel v. King*, (7 T. R. 370) after an attachment against the Sheriff for not bringing in the body, the Court would only relieve on payment of the whole debt and costs, and not merely the sum sworn to and costs; and to the same effect is *Fowlds v. Mackintosh*, (1 H. Bl. 233).

Acting on the late case of *Jonas v. Tepper*, it seems clear that had bail been put in here they would have been relieved on payment of the amount sworn to and costs. The question here is, should the measure of damages in this action against the Sheriff be substantially different from the amount which would be the extent of the bail's liability had bail been put in. The action is on the case, and the damages are open. The plaintiff by the escape has lost the benefit of good bail or the custody of the defend-

ant's body. As he has proved recovery of judgment, he has not been prevented from proceeding in his suit, as plaintiffs usually are when the defendant is not forthcoming in the suit.

We feel some doubt whether we should order a *venire de novo*, or direct the rule below to be made for entering a verdict for the plaintiff for the amount of costs ascertained by taxation, the plaintiff having before action accepted the sum sworn to.

We also feel a difficulty as to the costs. Should they be the costs up to the time of escape, or the costs of suit generally?

If we adopt the analogy of the case of *Jonas v. Tepper*, where bail were relieved, it would seem that costs up to the time of the application would be only payable, but that is only so far as the bail are concerned.

There Wightman, J., says "The defendant might have been discharged by himself paying the sum on the *capias*. Why may not the bail be in the same position?"

The 43 Geo. III. ch. 46, allows in England the deposit of money with the Sheriff in lieu of bail. It does not appear that we have any similar enactment here, though doubtless the practice has been to deposit money (*a*).

As a wide discretion was left to the Court to reduce the verdict to such amount as the Court may think proper, we are desirous of saving the parties the expense of a new trial; and we think that the proper course, under all the circumstances, will be to direct that the rule in the Court below should have been to reduce the verdict to the sum of \$25, which ought to be sufficient for the plaintiff's costs, and which, with the sum of \$150 paid before action, would be a reasonable sum for the plaintiff to have recovered under a proper direction to the jury.

We are especially anxious to save the parties a second trial, as we find that in that County Court on a judgment by default a sum of nearly £20 (\$78.78) has been taxed

(a) See Har. C. L. P. A., p. 54, note.

against a defendant. This has naturally excited our surprise. It may be possible that there is some reason for this.

Appeal allowed.

THE QUEEN V. MORTSON.

Application to quash conviction—Entitling rule nisi—Practice.

On application to quash a conviction, so soon as the return to the *certiorari* has been filed the cause is in this Court, and the motion paper and rule *nisi* must be entitled in the cause.

Where the rule was not so entitled it was discharged, but, being on a technical objection, without costs; and under the circumstances of the case an amendment was not allowed.

Blevins obtained a rule calling on Benjamin Pearson, Esquire, the committing Justice, and Lloyd, the prosecutor, to shew cause why the conviction of the applicant Mortson for trespass should not be quashed and set aside, on the ground of want of jurisdiction, &c. The rule was drawn up on reading the writ of *certiorari* issued to bring up the said conviction, &c., the return thereto by the Clerk of the Peace, to whom the conviction and the proceedings had been forwarded by the Justice, the conviction and depositions, and the papers, &c., filed on this application.

It appeared from the proceedings returned that the applicant was convicted of a trespass on the 5th of October last: that on the 9th October he duly appealed from the conviction to the sessions holden in the present month of December: that on the 15th November he applied in chambers and obtained the *certiorari*; and on the 25th November the Clerk of the Peace returned the conviction and proceedings into this Court.

Neither the motion paper nor the rule *nisi* herein were entitled in any cause.

K. McKenzie, Q. C., shewed cause, and took this as a preliminary objection, citing *Paley* on Convictions, 413-15, 423-4; *Rex v. Rhodes*, 1 Keble 944.

Blevins supported the rule.

MORRISON, J., delivered the judgment of the Court.

We are of opinion that the objection must prevail. It is quite clear that the moment the return to the *certiorari* is on the files of the Court, the cause itself is in this Court, and that any proceeding taken or had after such filing ought to be entitled in the cause. Before the filing of the return of the *certiorari* affidavits and rules should not be entitled, for until the return is filed there is no cause pending here. We refer to *The Queen v. Jones* (8 Dowl. 80) which is an authority in point; also to *Franks v. Wicks* (9 Dowl. 490). There the objection was the converse of the one here, namely, that the proceedings were entitled in the cause; but Coleridge J. said "The proceedings are returned by *certiorari*, and therefore there is a cause virtually depending in this Court. Consequently, the affidavits are properly entitled." See also *Perrin v. West* (3 A. & E. 405).

In *Ex parte Wallwork* (4 D. & L. 403.) a rule *nisi* was obtained for a writ of *certiorari*. It was objected that the affidavits were entitled in the matter of *The Queen v. Wallwork*, there being no such cause in Court. It was admitted on the argument that if the proceeding had been after the writ issued, the affidavits should be entitled in the cause, and the rule was discharged. Applications to quash convictions are now frequently made, and objections of a similar nature as to the entitling of the proceedings arise. As said by Patteson, J., in the last case cited, we think we should not leave any doubt on the subject, but compel the general rule, and require that affidavits, &c., in cases like the present be entitled in the cause.

The only question was whether we might not allow the rule to be amended on terms; but it was not asked for, and we cannot say that this is a case in which the applicant is entitled to any favor. The objection to the conviction is, that the Justice was ousted of jurisdiction: that although a case *primâ facie* in which he had authority to act, yet from the evidence he should have inferred that the defendant committed the trespass under a fair and reasonable supposition that he had a right to do so. We are not prepared

to say that the case was one of that character, and although the applicant was defended by an attorney, it does not appear from the proceedings returned that any such objection was urged to the Justice. It is true that on the application for the *certiorari* the defendant swore that upon the investigation of the charge he claimed title to the premises; but it is sworn by the Justice, that neither the defendant nor his attorney for him made any such claim or objected to his jurisdiction, and four other persons swear positively to the same effect. If any such objection had been made it would have been most likely made by the gentleman who conducted the defence, and if made the Justice might have given effect to it and although he is the attorney herein he files no affidavit.

We notice also that the defendant appealed, and before such appeal could be heard he applied for the *certiorari*, and removed the proceedings. The fact of the appeal was not brought under the notice of the learned Judge who granted the rule for the writ. If it had, been in all probability the Judge would have refused the rule, and most of these vexatious proceedings would have been avoided. We discharge the rule, but, being on a technical objection, without costs.

Rule discharged.

THE QUEEN V. MURRAY.

Conviction—Appeal to Q. S.—Adjournment—Certiorari—Notice.

Under Consol. Stat. U. C. ch. 114 the costs of appeal from a conviction, as well as the appeal itself, must be determined at the Sessions appealed to. There is no power to adjourn the question of costs. Where the application for a *certiorari* to remove a conviction is made by the prosecutor, no notice to the justices is necessary.

Osler, counsel for Leonard, the private prosecutor, obtained a rule calling on the Chairman and Justices of the Peace for the County of Huron, to shew cause why the order of the Court of General Quarter Sessions

made in the matter of the appeal herein, holden in the month of June, 1867, and so much of the order of the said Court made in the same matter at the Sessions holden in the month of March, 1867, as assumes to adjourn the hearing of the said appeal or the question of costs until the said June Sessions, should not be quashed, with costs, on the ground that the said Court exceeded its jurisdiction in adjourning the matter of the said appeal from the March Sessions until the June Sessions, and that the Court had no jurisdiction to adjourn the hearing of the appeal, and adjudicate therein and award costs at a subsequent hearing.

The rule was drawn up on reading the writ of *certiorari* and return thereto signed by the Chairman of the Quarter Sessions and the Clerk of the Peace, and the two orders of the Sessions and other papers returned therewith made in the matter of the appeal.

McMichael shewed cause, and objected that it did not appear that notice of the application for the *certiorari* had been served on the Justices, citing *Regina v. Peterman* (23 U. C. R. 516) *Regina v. Ellis*, (25 U. C. R. 324); and he contended that the Sessions had determined the appeal at the March Sessions, the question of costs being a matter which the Court might consider at the following Sessions.

Osler supported his rule, submitting that notice to the Justices was not necessary in the case of the prosecutor applying for a *certiorari*, *Paley on Convictions*, 357, 358, 365, 368, *Rex v. Farewell*, 1 East 305; *Rex v. Inhabitants of Bodenham*, Cowp. 78; *Rex v. Berkeley*, 1 Ken. 80; *Rex v. Boulton*, 4 A. & E. 498; *Regina v. Spencer*, 9 A. & E. 485; and as to the illegality of the rules he relied on *In re McCumber and Doyle*, 26 U. C. R. 516.

MORRISON, J., delivered the judgment of the Court.

In this case it appeared that Murray was convicted on the 22nd February, 1867, before a Justice of the Peace, upon

the information of Leonard, the applicant, of committing "a spoil by taking away a chisel from Leonard, and refusing to return it when asked therefor," and fined 25 cents and \$3.75 costs: that he appealed from the conviction to the (next) March Sessions: that at such Sessions the appeal was heard, and it was ordered by the Court, "that the conviction be quashed, and the question of costs shall remain over until next Sessions, with liberty to file affidavits to prove what occurred before the magistrates as touching the question of costs": that at the following June Sessions the appeal was again heard, and this order made, "that the appeal be allowed, and the conviction of the appellant by Christopher Crabb, Esq., be quashed, with \$25 costs to be paid by the respondent to the Clerk of the Peace, &c., within thirty days from the date hereof, to be by him paid over to the appellant, he being the party entitled to the same. Dated 15th June 1867 and made in open Court": that on the 16th July last Leonard, the private prosecutor, made application and obtained the *certiorari* removing all the proceedings into this Court.

As to the objection of want of notice to the justice of the application for the *certiorari*, it is laid down in *Paley* on Convictions, and clear upon authority, that where the application for the writ is made by the private prosecutor it issues of course, and without assigning any grounds, nor is any notice, &c., necessary.—*Rex v. Battams*, 1 East 298, 303. The case of *Regina v. Peterman*, referred to, was that of a defendant obtaining a *certiorari* with a view of quashing a conviction.

Then as to the merits, this case must be governed by the decision in *McCumber and Doyle* (26 U. C. R. 516).

The words of sec. 1, ch. 114, Consol. Stat. U. C., by authority of which the appeal was heard, are "and such Court shall at such Sessions hear and determine the matter of such appeal, and make such order therein, *with or without costs* to either party, as to the Court seems meet."

We have already decided that the Legislature intended that the appeal should be disposed of at such Sessions, and

we think it is quite clear from the language of the section that the matter of costs should be determined at the same time. Various reasons might be suggested why it should be so, if the language itself was not clear. The Justices who preside at Quarter Sessions, with the exception of the Chairman, are seldom the same. In the present case no one of the four who were present at the March Sessions and heard the appeal were present at the June Sessions, when the costs were disposed of.

No doubt the Sessions has a general power to adjourn; but, as said by Cockburn, C. J. in *Bowman v. Blyth*, in the Exchequer Chamber, on Appeal (7 E. & B. 47), "we are unanimous in thinking that the decision of the Court of Queen's Bench in this case ought to be affirmed. Their judgment proceeds on the ground that, though the Court of Quarter Sessions have in general power of adjournment, yet, when an Act giving any particular jurisdiction plainly intimates an intention that such particular jurisdiction is to be exercised by one particular Sessions, that Sessions cannot adjourn it to another." And Martin B. in the same case says, "I will only add that, though I do not question that, in construing acts, language seemingly positive may sometimes be read as directory, yet such a construction is not to be lightly adopted; and never when, as in this case, it would really be to make a new law, instead of that made by the Legislature."

We are therefore of opinion that this rule should be made absolute, but as, as in the case of *McCumber and Doyle*, no objection appears to have been made when the adjournment of the appeal was ordered, there will be no costs.

Rule absolute.

CAMPBELL V. THE CORPORATION OF YORK AND PEEL.

York and Peel—Services of Registrar of Peel under 29 Vic., ch. 24, secs. 26, 33—Joint liability of Counties after separation—Pleading—Evidence.

Held, as decided upon demurrer to the declaration, 26 U. C. R. 635, that the Corporations of York and Peel were jointly liable to the plaintiff, as Registrar of Peel, for services rendered by him under secs. 26 and 33 of the Registry Act, before the separation of the Counties.

Held, also, that a demand of payment on the Treasurer of the Counties and refusal by him was sufficiently shewn by the evidence set out below; and that the Inspector's certificate under sec. 70, though given after the separation, was sufficient, it not being a condition precedent to the right of action on such refusal.

Held, also, no objection that the memorials copied by the plaintiff had been received by his predecessor, not by himself.

DECLARATION, that the plaintiff before and since the 29 Vic. ch. 24, was and is Registrar of the County of Peel, and before its separation from York a separate registry office was before and after the Act established in Peel, and the plaintiff after the Act, and before the separation, performed certain duties under sections 26 and 33 of said Act, the fees for which duties according to said Act amounted under sec. 26 to \$963.61, and under sec. 33 to \$2000, which fees were duly certified by the Inspector of Registry Offices: that such duties were required by the Act, and were to be performed by the plaintiff as Registrar under these sections and after he had performed the duties the plaintiff did before action request the proper Treasurer to pay, &c., but he refused: that Peel was afterwards, and before this action, separated—whereby an action hath accrued against the defendants.

Plea, by the defendants separately, never indebted.

The case was tried at Brampton, before Adam Wilson, J.

A certificate by the Inspector of Registry Offices for services under sec. 33 was put in for \$2000, and another under sec. 26, for \$963.61.

Several letters were put in evidence, passing between the plaintiff and the Treasurer of York and Peel.

A witness proved that he went with an order from the plaintiff for the two sums to the office of the Treasurer of

York and Peel, and spoke to a person he supposed was the Treasurer, who referred him to the Warden, who referred him to their legal advisers, by one of whom he was told that the County of York did not intend to pay the account at all. This was in February, 1867. The Treasurer said he thought that Peel should pay.

For the defence, *M. C. Cameron*, Q. C., for the County of York, moved for a nonsuit, on the ground that there was no sufficient proof of the account, or of the time the services were rendered : that the certificate does not refer to York more than to Peel, and does not refer to particular services rendered : that there was no sufficient request under the Statute to pay : that this is a joint action, and no demand is shewn on the Treasurer of Peel : that the County of York was not liable : that secs. 68 and 70 of the Registry Act, 29 Vic., ch. 24, shew that Peel is the County liable : that the fees are to be recovered from the County in which the separate Registry Office is : that Peel had been set off when the demand was made : that the lands lie there, and it had a separate Treasurer : that the plaintiff had not shewn that he received any memorials from any other County, of which he was to make copies, and till then he had no duty to perform.

The plaintiff was then called as a witness. He said he had been Registrar over three years : that the memorials he copied were not received by him, but by his predecessor : that he had received about £560 from the Treasurer of the United Counties for services under sec. 26 : that he began copying in November, 1865 : that he had been paid all his accounts rendered of that class except \$963 ; he had got nothing on account of the abstract indices. There was no other formal request to pay than appeared by the letters and accounts put in ; and nothing received on the two accounts sued. In August, 1866, he rendered the account to the Treasurer for \$963.61. In December he rendered the account for \$2000. The person he saw in the Treasurer's office said he had no authority to pay it. No demand was made on

Peel since the separation excepting the letter (which letter was not among the exhibits).

The defendants, the County of York, then objected that as the plaintiff had not received the memorials, he was not an officer to do the work, &c.

It was agreed that a verdict should be taken for the plaintiff, with leave to the defendants to move to enter it for them, or for a nonsuit.

M. C. Cameron, Q. C., obtained a rule on the leave reserved, to which *James Paterson* shewed cause.

HAGARTY, J., delivered the judgment of the Court.

The Inspector's certificates of the due performance of the work bear date 16th January, 1867. The accounts had been previously rendered to the Treasurer of York and Peel before the 1st January, when the final separation took place. There is, we think, sufficient evidence of a demand on the York Treasurer, and of a refusal by him. All the work was done before the final separation, and the plaintiff had been for some time applying to the Treasurer of the United Counties for payment.

The objections urged at the trial came, as we understand, from the counsel for the County of York. The County of Peel plead never indebted separately, and do not appear to join in the line of defence taken by York. The attorney on record for Peel was examined by the plaintiff as his witness, to prove a demand on the York Treasurer.

There was a demand of payment and refusal, or what would be legally equivalent to a refusal on the part of the Treasurer of the United Counties prior to a final separation. It is quite true that the Inspector's certificates were not given or furnished till after the 1st January, but we do not read sec. 70 as making the certificates a condition precedent to the right of action on demand and refusal to pay. The Act, after giving the right of action, then declares that "the Inspector's certificate of the amount and of the services rendered shall be *primâ facie* evidence of the right to recover."

We consider that under the Statute the accounts were sufficiently proved, and we do not agree to the objection that the present Registrar was not entitled to do or be paid for the work, as he had not received the memorials.

It was the officer as Registrar receiving memorials, and not any particular individual in his personal capacity, that we think the Statute points to and on whom it casts the duty.

Our judgment on the demurrer to the declaration (26 U. C. R. 635) covers many of the objections. We said there, "At the moment of dissolution it is a debt due by all the United Counties." So we hold here, that at the moment of dissolution, on the 1st January, 1867, the action had fully accrued to the plaintiff; and, in the further words of the judgment, "it continues a debt against all, as if, after each had commenced its independent corporate existence, it had been again contracted by them jointly with the other."

This view renders it useless to discuss the necessity of a separate demand on the Peel Treasurer.

The result at which we have arrived may produce an effect not probably contemplated on the separation of these Counties, and bearing with apparent hardship on the County of York. We see however no other solution of the legal difficulty.

Rule discharged (a).

THE QUEEN V. PATTERSON.

Assisting sailors to desert—C. S. U. C. ch. 100—Form of indictment, &c.

Defendant in a criminal case obtained a rule *nisi* for new trial, but his term of imprisonment expired before judgment could be given after the argument, and the decision therefore became immaterial.

The indictment charged that the defendant "did receive, conceal *or* assist" one W., a deserter from the Navy. *Semble*, not sufficiently certain and precise.

The Naval Discipline Act, 29 & 30 Vic. ch. 109, sec. 25, authorizes a summary conviction before magistrates for this offence, but the 101st section expressly preserves the power of any Court of ordinary civil or criminal jurisdiction with respect to any offence mentioned in the Act punishable by Common or Statute Law; and *Held*, therefore, that the defendant could be indicted under the Consol. Stat. U. C. ch. 100, sec. 2.

THE defendant was convicted at the last Assizes for the County of Simcoe, upon an indictment that he, on the 1st August, 1866, at, &c., not being an enlisted soldier or a sailor engaged in the naval service of Her Majesty or military service, did receive, conceal, or assist one James Wells, a deserter from Her Majesty's naval service, well knowing the said James Wells to be a deserter from the naval service of Her Majesty, contrary to the form of the Statute,

He was sentenced on the 10th October, 1867, to two months imprisonment.

McMichael obtained a rule calling upon the Attorney General for this Province to shew cause why there should not be a new trial, on the following grounds: 1. That the only Statute in force for the trial of persons charged with this misdemeanor is the Mutiny Act of 1867, which only authorizes the trial of the same before two magistrates, and that the Court of Oyer and Terminer and General Gaol delivery, at which the defendant was tried, had no jurisdiction or power to try him. 2. That the indictment was bad, in this, that it contained three distinct and separate charges; and that the learned Judge misdirected, in not compelling the Crown counsel to elect for which of the said charges contained in the indictment he would prosecute. 4. For misdirection, in telling the jury that they might find the defendant guilty, although they were satisfied he

did not conceal the alleged deserter. 5. That the verdict did not dispose of the indictment, it purporting merely to be a verdict as to one of the charges contained therein, leaving the defendant neither convicted or acquitted of the other two.

On the 5th December *John Paterson* shewed cause, citing *Arch. Crim. Plg.*, 15th Ed., 55, 515; *Rose. Crim. Ev.*, 6th Ed., 78-9; *Regina v. Bowen*, 1 C. & K. 501; *Rex v. Hunt*, 2 Camp. 584; *Rex v. Middlehurst*, 1 Burr. 400.

McCarthy supported the rule. The most important part of his argument was whether, as the rule stated, under the Mutiny Act, or, as he argued, also under the Naval Discipline Act, the Stat. of U. C. (Consol. Stat. U. C., ch. 100). was not suspended or superseded. He cited *Regina v. Sherman*, 17 C. P. 166; *Rex v. Marshall*, 1 Moo. C. C. 158; *Rex v. Fuller*, 2 Leach C. C. 790; *Daw v. The Metropolitan Board of Works*, 12 C. B. N. S. 161; *Hawk. P. C.*, Book 2, ch. 26, sec. 75.

DRAPER, C. J. delivered the judgment of the Court.

The defendant's term of imprisonment expired on the 10th December instant (*a*), when we presume he was discharged. It would be a strange proceeding to grant a new trial when the judgment and sentence had been carried into full effect, and we do not suppose it is now of any importance to the defendant if we were to make the rule absolute. The Statute, under which a new trial may be granted in criminal cases, makes no provision for any relief to a man who is confined on a sentence of imprisonment in gaol or in the penitentiary, and obtains a rule *nisi* for a new trial. There is however one question of importance raised in this case, to which I have given consideration, and on which I am prepared to express the opinion I have formed.

The indictment, verdict and judgment, are brought before us by exemplification. The indictment is in substance as stated above. The *venire* is to try "whether the said John

(a) Judgment was given on the 23rd December.

Patterson be guilty concealing a (*a*) deserter from the Royal Navy in the indictment above specified or not," and the judgment is thus entered, "Wherefore it is considered by the Court here that the said John Patterson is guilty of *serving* James Wells, knowing he was a deserter from Her Majesty's R. N." (*b*)

No question was raised as to whether the proper mode of bringing up the record and proceedings on a motion for a new trial was by exemplification, when the motion is in the same Court in which all the proceedings are said to be enrolled, nor was it brought under our notice that the *venire* did not state the issue accurately, nor was the form or substance of the judgment observed upon. Probably (unless these matters were overlooked) it was thought a writ of error would more properly bring them up.

The first objection in the rule is, that the only Statute in force for the trial of persons charged with the misdemeanour for which the defendant was tried is "The Mutiny Act of 1867." 30 Vic. ch. 13. The very foundation of the necessity of this annual Act, the constitutional objection to raising or keeping a standing *army* in time of peace without the consent of Parliament, has apparently been forgotten, and that the provisions of the Act relate only to *soldiers* or to persons in connection with their conduct towards those who come within the meaning of the Act as *soldiers*. The 81st sec. of the Mutiny Act, referred to in the rule, which creates an offence of a similar character in regard to soldiers, which the defendant is charged to have committed in respect to a deserter from the Royal Navy, if read with the least attention would shew its inapplicability to the present case. And indeed the learned counsel who supported the rule, by his reference to the Imperial Statute 29 & 30 Vic. ch. 109, sec. 25, "An Act to make provision for the discipline of the Navy," shewed that he did not rely on the first objection as it was framed.

That section enacts, "that if any person not subject to

this Act assists or procures any person subject to this Act to desert or improperly absent himself from his duty, or conceals, employs, or continues to employ any person subject to this Act, who is a deserter or improperly absent from his duty, knowing him to be a deserter or so improperly absent, he shall, for every such offence of assistance, procurement, concealment, employment, or continuance of employment, be liable, on summary conviction thereof before a Justice or Justices," to a penalty not exceeding £30; and it provides how the penalty is to be applied.

I concede that upon the evidence given in this case a prosecution might have been sustained. That evidence is however equally applicable to the second section of the Statute of Upper Canada, (Consol. Stat. U. C. ch. 100), under which this indictment was professedly framed. But then the 101st sec. of the Naval Discipline Act, which was not referred to in the argument, expressly provides that nothing in that Act "shall be deemed or taken to supersede or affect the authority or power of any Court or tribunal of ordinary civil or criminal jurisdiction, or any officer thereof, in Her Majesty's dominions, in respect of any offence mentioned in this Act which may be punishable or cognizable by the Common or Statute Law, or to prevent any person being proceeded against and punished in respect of any such offence otherwise than under this Act." If the Provincial Statute were otherwise held to be within the prohibition of the 7 & 8 Wm. III. ch. 22, as repugnant to a law of the United Kingdom, this section would remove the difficulty.

I will only say as to the second objection, that if it were necessary to dispose of it, my present impression is, that as the charge is laid, that the prisoner did receive, conceal *or* assist, it wants that certainty and precision which a criminal charge should have, though there are numerous instances where the Statute being disjunctive a conjunctive statement is commonly used in an indictment. For instance, the Stat. 7 & 8 Geo. IV. ch. 30, enacts, that if any person shall unlawfully and maliciously cut, break *or* destroy any threshing machine. The indictment may charge

that the accused did feloniously, unlawfully, and maliciously cut, break, *and* destroy. So, where the offence by Statute was unlawfully or maliciously breaking down *or* cutting down any sea bank or sea wall, the indictment may charge that he did cut down *and* break down; and it might be urged here that there should be no new trial, because the evidence disclosed only one existing state of facts equally applicable to receiving, concealing and assisting, and if the charge were laid conjunctively the prisoner could not be injured, for his defence would only be to the one state of facts on which the prosecutor relied to prove his guilt, if the charge were not laid disjunctively. But as it is, it appears to me that although acts which would prove concealment must involve receiving, and still more certainly assisting, yet there might be acts of assistance quite apart from either concealment or receiving, and therefore that there is a want of due precision and certainty in the charge.

But we think it quite unnecessary, as all the legal consequences of the conviction are at an end, to examine further what we should do if it were otherwise. It is too late for us to grant a new trial, and as far as we have considered the case on its merits we are of opinion that the verdict was right, and that there has been no failure of strict justice.

THE QUEEN V. HALL.

Patent for Invention—Scire facias to repeal—Delivery of particulars—Practice—C. S. C., ch. 34, sec. 20, sub-sec. 2.

The effect of Consol. Stat. C. ch. 34, sec. 20, sub-sec. 2, enacting that the proceedings on a writ of *Scire Facias* to repeal a patent shall be "according to the law and practice of the Court of Queen's Bench in England," is to introduce the Imperial Act 15 & 16 Vic. ch. 83.

Held, therefore, that leave to deliver particulars of the breaches, which should have been delivered with the declaration, could only be granted as if the declaration were delivered *de novo*; and that as the jury had been sworn, and this therefore could not be done, a verdict was properly directed for the defendant.

The Court however, upon affidavit, allowed the plaintiff to deliver particulars, on terms.

ON the 29th March, 1867, a writ of *scire facias* was issued,

reciting letters patent under the great seal of Canada, dated 23rd September, 1865, by which Her Majesty granted to the defendant the exclusive right of making, &c., a new and useful improvement in the construction of lumber waggons, for use in mill and lumber yards, for the term of fourteen years from the date; and suggesting that the defendant was not the first inventor, and that one Thompson Smith was at the time of making the letters patent the first and true inventor; and that the said supposed invention, pretended to be attained unto by the defendant, was at the time of the grant aforesaid used by the said Thompson Smith; and commanding the Sheriff of the County of York to give notice to the defendant that he be before our said lady the Queen in our Court of Queen's Bench, on the first day of Easter Term then next, at the City of Toronto, to shew why the said letters patent and the enrolment thereof should not be cancelled.

The defendant pleaded to the first suggestion, that the said invention was invented and found out by him.

To the second suggestion, reasserting that the defendant was the first inventor, and that Thompson Smith was not.

The third suggestion was demurred to. Issue was joined on all the pleas (1st, 2nd, and 3rd) and a joinder in demurrer was added.

The case came on for trial at the Assizes for the County of York, in October last, before Adam Wilson, J.

After the jury were sworn and the prosecutor's counsel had opened his case, the defendant's counsel interposed, insisting that the prosecutor should, under the Imperial Act 5 & 6 Wm. IV. ch. 83, have delivered with the declaration the particulars of the breaches complained of: that the later Imperial Act 15 & 16 Vic. ch. 83, provides to the same effect: that the Consol. Stat. C., ch. 34 sec. 20 sub-sec. 2, declares in effect that the proceedings on the writ of *scire facias* shall be according to the law and practice of the Court of Queen's Bench in England, and under the provisions of that Act, and as that Consol. Stat. took effect on the 5th December, 1859, the Imperial Statute 15 & 16 Vic. must govern. The counsel for the prosecution asked to be allowed

to deliver the particulars then, and the learned Judge was inclined to grant the leave upon terms, to which the defendant's counsel objected.

It being Saturday, and the time for adjournment near at hand, the case was adjourned until Monday morning. The learned Judge then,—after hearing the parties and referring to *Losh v. Hay* (or *Hague* as referred to in some books) 2 Jur. 157, 7 Dowl. Pr. Ca. 495, and see *Godson* on Patents 239—expressed an opinion that by the words in the Consol. Stat. “according to the law and practice of the Court of Queen's Bench in England,” the law and practice when that Statute came into force were introduced, and consequently that the Imperial Statute 15 & 16 Vic. ch. 83, sec. 41 was applicable; and that leave to deliver particulars could only be granted as if the declaration were delivered *de novo*, which, as the jury had already been sworn, could not be done; and that as there could be no nonsuit, he felt compelled to direct a verdict for the defendant.

Bell, Q. C., (of Toronto) obtained a rule calling on the defendant to shew cause why there should not be a new trial, on the ground that the learned Judge ruled that the prosecutor could give no evidence because particulars had not been delivered with the declaration, and that he, (the Judge) ruled he had no power to grant leave to deliver such particulars; or for a new trial, with leave to the prosecutor to deliver such particulars or declare *de novo*. This application for a new trial, &c., was founded on the affidavit of Thompson Smith, the prosecutor of the *scire facias*.

Dalton shewed cause.

DRAPER, C. J., delivered the judgment of the Court.

We agree in the opinion of the learned Judge, that the practice is to be regulated by the 15 & 16 Vic. (Imperial Act) as regulating the law and practice of the Court of Queen's Bench in England at the time the Consolidated Statutes of Canada came into force. The 4th, 8th, 9th and 10th

sections of the Interpretation Act in our opinion establish that conclusion.

We also agree that, under the circumstances, after the jury were sworn the inevitable result was a verdict for the defendant.

There is consequently only the question of a new trial, and the application respecting the delivery of the particulars, to be disposed of.

This is rested upon the affidavit of Thompson Smith, who prosecutes this writ of *scire facias*, in which he asserts that he is the inventor, and explains how the defendant was made aware of the invention, and so had the opportunity of obtaining letters patent for it. He is obviously under the natural bias which, assuming his representations to be substantially true, his own interest in the matter must give him. His object in endeavouring to get the patent to the defendant out of the way requires no comment or explanation.

And the most material part of his statements are met, some of them very fully, by the affidavits filed for the defence. If we were required to try the case, it would perhaps be difficult to resist the conclusion that they outweigh the prosecutor's statement.

If Smith were defending himself in an action brought for the infringement of the patent, we apprehend we should follow the case cited, and if he had neglected to deliver his objections to the patent with his pleas, we should permit him to plead *de novo* and deliver his objections with new pleas.

And as the affidavits indicate to our mind a *bonâ fide* dispute on a question of fact, which a jury should dispose of, we think we should permit the plaintiff to deliver the particulars of breaches within ten days from this date, and that the filing of the return of the writ of *scire facias*, and the notice to the defendant to appear and answer thereto, shall be considered as if made and given *de novo* upon the day on which such particulars are delivered, and that the defendant may plead thereto as he shall be advised, accord-

ing to the practice of this Court in the like cases; and that this rule be granted upon payment by the prosecutor of the defendant's costs, to be taxed by the Master.

Rule accordingly.

GIBB AND THE CORPORATION OF THE TOWNSHIP OF MOORE

Town hall—By-law to erect—Provision for payment.

A By-law for the construction of a new town hall in a Township, passed 22nd May, 1867, was moved against, on the ground that it authorized expenditure for a purpose not under the head of ordinary expenditure, without having money in hand or making the necessary provision by rate or otherwise to meet the demand. It appeared however that the sum required was included in the annual by-law for the year, passed on the 19th August, 1867, upon an estimate previously made, also including it, which the applicant had voted to adopt; that the town hall had been completed, accepted and paid for, and the land on which it stood conveyed to the corporation.

Under these circumstances the rule to quash the by-law was discharged with costs.

Harrison, Q. C., obtained a rule on the corporation of the Township of Moore to shew cause why their by-law passed on the 22nd May, 1867, entitled a "By-law for the construction of a new town hall in the Village of Mooretown, and providing for the expenses thereof," should not be in whole or in part thereof quashed, with costs, because the said by-law authorizes the expenditure of money for a purpose not falling under the head of ordinary expenditure, without having money in hand to meet the demand, without making any provision by rate or otherwise to raise the necessary amount to meet the demand, and without containing the recitals necessary to the validity of a by-law passed to raise money on the credit of the corporation; and on grounds disclosed in affidavits and papers filed.

The application was founded upon the affidavit of the Reeve of the Township, who swore that the funds for building the town hall mentioned in the by-law were taken from the money in the treasury of the Township intended

for and appropriated to the ordinary expenditure of the Township: that no special rate was made to replace the funds so taken, other than a rate of $1\frac{1}{4}$ cents on the dollar to meet the ordinary expenditure for the present year; and that all the funds in the treasury at the time of passing the by-law were appropriated to the repairing of roads and ditches, &c., and no portion of the same were intended to be applied to the building of the new town hall, or any other or different purpose from those mentioned. He also stated that serious inconvenience and loss was occasioned to parties to whom the corporation was indebted for work and labour, by reason of the funds being applied to the building of the town hall.

In answer to the applicant's affidavit, the corporation filed affidavits of the Deputy Reeve, two other Councillors, the Treasurer, and the Clerk of the Corporation, which affidavits all went to shew that, deducting the appropriations made by the corporation during the year 1867, down to the date of the by-law (22nd May) out of the funds in hand at that time, there was in the treasury nearly \$1200, besides \$858.27 in the County Treasurer's hands belonging to the corporation, ready to be paid on demand, making together over \$2000, and which sums might be lawfully applied to meet the expenditure on the new town hall. And attached to the affidavits of the Deputy Reeve and Clerk were certified copies of a general estimate of, and shewing in detail, the ordinary expenditure and liabilities of the corporation for the year 1867, made on the 28th June. 1867, and the ways and means to meet the same, the whole expenditure and liabilities amounting to \$8635, including the \$1500 for the town hall; the ways and means being \$4619, composed of \$1438 in cash on hand and money to be received, and the rate of $1\frac{1}{4}$ cents referred to in the applicant's affidavit estimated to raise \$5771, making in all \$10,390, leaving, after deducting expenditure and providing for liabilities for the year, a balance of \$1755 for future appropriations.

It also appeared by the affidavits of the Deputy Reeve and

the Clerk, that when the rate of $1\frac{1}{4}$ cents was struck the applicant knew that in the estimate of expenditure was included the \$1500 for the town hall: that he himself drew the resolution to levy the rate of $1\frac{1}{4}$ cents with that knowledge, and voted for the same, and that in accordance with that resolution a by-law was passed on the 19th August, 1867.

It also appeared that the fee of the land on which the hall was built was vested in the corporation, and that the town hall had been fully completed and accepted, and had been occupied and used for some time: that it had also been paid for, except as to \$200 unpaid, the amount being in silver in the Treasurer's hands, and the person holding the order for it preferring to wait until bank notes came into the Treasurer's hands, and the \$200 only remained unpaid for that reason.

It was also denied that any inconvenience or loss had been occasioned to any one, as stated in the applicant's affidavit.

C. Robinson, Q. C., shewed cause, citing *Michie and The Corporation of Toronto*, 11 C. P. 386; *Clapp and The Corporation of Thurlow*, 10 C. P. 533; *Gibson and The Corporation of Huron and Bruce*, 20 U. C. R. 111; *Hawke and the Municipality of Wellesley*, 13 U. C. R. 636.

John Paterson supported the rule; and cited *McMaster and The Corporation of Newmarket*, 11 C. P. 402.

MORRISON, J. delivered the judgment of the Court.

Upon a perusal of the affidavits and papers filed on both sides, we are of opinion that this rule should be discharged.

On the whole, the affidavits filed on the part of the corporation fully meet and displace the case made by the applicant.

Then with respect to the by-law itself, for all that appears on its face there was money on hand to meet the demand; and as to the last objection, that it does not contain the necessary recitals, assuming for argument that it is a by-law requiring recitals, as said by Sir John Robinson in

giving judgment in *Gibson and The Corporation of Huron and Bruce*, (20 U. C. R. 121), "From the absence of any such recitals and provisions we are not at liberty to infer anything against the validity of the by-law, unless we can see clearly on the face of the by-law, or have otherwise shewn to us, that the by-law was passed for a purpose which required them to be inserted. If for all that appears the by-law may be legal, we are not to conjecture the existence of facts that would render it illegal * * It is difficult to foresee how much public inconvenience may be sometimes occasioned by quashing by-laws after they have been acted upon, and though this can never be admitted as a reason for sustaining what has been clearly shewn to be illegal, it is a strong reason for declining to quash a by-law except on some clear grounds."

Rule discharged, with costs.

MEMORANDA.

The following gentlemen were called to the Bar during this term :—BENJAMIN CRONYN, JOHN WESLEY FLETCHER, ADAM HUDSPETH, JAMES MAGEE, WALTER HOYT CUTTEN, WILLIAM JOHNSON, JOHN MORISON GIBSON, HENRY BECHER, ADAM HENRY MEYERS, JOHN EDWARD ROSE.

ERRATUM.—In the list of Queen's Counsel appointed during last Easter Vacation (p. 35) the name of Mr. Robert Alexander Harrison was inadvertently omitted. It should have been inserted after that of Mr. John D. Armour.

HILARY TERM, 31 VICTORIA, 1868.

(February 3rd to February 15th.)

Present :

THE HON. WILLIAM HENRY DRAPER, C. B., C. J. (α)

“ “ JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J.

GRANT AND THE CORPORATION OF THE TOWNSHIP OF
PUSLINCH.

Town Hall—By-law to erect—Provision for payment.

A Township corporation passed a by-law on the 15th June, 1867, authorizing the purchase of a site for and the erection of a town hall, but not making provision for meeting the expense, for which it did not appear that there were surplus moneys on hand. On the 31st of August they passed the annual by-law for ordinary expenditure, and, in addition to the sum required therefor, provided by the same by-law for raising the amount required for the site and building. On application to quash these by-laws, it appeared, in answer, that the site had been conveyed to the corporation and paid for, and the hall completed, and that there were funds in the treasurer's hands to pay for it.

Held, that although the corporation might not have been strictly regular the by-laws should not now be quashed, and the rule was discharged, but without costs.

In this case *Walsh*, during last term, obtained a rule *nisi* calling upon the Corporation of the Township of Puslinch, to shew cause why by-laws Nos. 144, 145, and 146, or some of them, or some parts thereof, should not be set aside, with costs, on various grounds : 1. That it does not appear by said by-laws, or either of them, at what time the debt or obligation thereby created should fall due or be discharge-

(α) The Chief Justice was absent during all except the first three days of this term, owing to illness.

able. 2. That the debts, as to the purchase of a site of a town hall and the erection thereof, is not an ordinary expense of the Township. 3. That the amount of the rateable property of the Township for the year 1867, according to the last revised assessment roll, is not recited in either of said by-laws. 4. That it is not stated whether the corporation had at the time of passing the by-laws respectively other or any existing debts, whereby it might be known whether the rate for this debt would be beyond the power of the Council to contract. 5. That the corporation had not surplus funds or moneys in their hands at the time of passing any of the by-laws for the purchase of the site of the town hall, or the erection of the building thereon. 6. That the said by-laws, or so much of them as relates to the site and the erection of the hall, is bad and voidable. 7. That the by-laws were not submitted to the ratepayers, according to the Statute. 8. That by-laws Nos. 144 and 145 do not shew on what day or at what time they go into effect.

The application was made on sworn copies of the by-laws and affidavits, shewing that the site for the town hall had been purchased and a contract entered into for the erection of the building, and that the works were in progress.

The facts in the case, from the affidavits filed, appeared to be these :—that the Council of the Township on the 15th June, 1867, passed a by-law, No. 144, authorizing the purchase of a particular piece of land for a site for a town hall, paying therefor \$384, which the Treasurer was to pay out of the funds of the corporation : that on the 29th July they passed a by-law, No. 145, to raise by rate moneys for the general purposes of the corporation, and also to provide means to pay for the town hall and site.—(It is unnecessary to notice this by-law at length, as it was never acted upon and was repealed) ; and that on the 31st August 1867, they passed by-law No. 146. This by-law recited that by-law 145 had not been acted upon, and after reciting that estimates had been made for the lawful purposes of the township for the year 1867, it provided that in addition to the rate for County purposes, &c., there must be

levied for a site and the erection of a Town Hall authorized by by-law 144, \$2000. It then enacted that by-law 145 be repealed, and it provided for the raising and collecting upon the rateable property in the Township for the then present year, besides the sum required for the ordinary purposes, \$2000 for the site and building, and for that purpose imposed a rate of 2 mills in the \$, which would be sufficient to meet that amount.

It also appeared that the town hall was much wanted, and that it was the desire of the ratepayers that one should be erected : that the township was a wealthy one, and without any debt : that it was not intended to create any debt on account of this site and hall to be erected thereon, but that the whole amount required should be imposed by a rate for that purpose, and collected and paid over during the then current year : that \$3029 had been collected of the rate imposed by by-law 146, without any distress being made : that the site was paid for out of these rates : that on the 5th December the town hall was completed and pronounced satisfactory by the Township Inspector : that according to the terms of the contract, a copy of which was attached to the Treasurer's affidavit, the building was only to be paid for when completed and passed by the Inspector ; and the Treasurer swore there was more than enough in his hands to pay the full amount of the contract price.

C. Robinson, Q. C., and *Guthrie* shewed cause during the same term, referring to the Municipal Institutions Act 1866, secs. 191, 234, 235, 225, 226, 227, 246, sub-sec. 1, 269, sub-sec. 3, 279, 282 ; *Fletcher and the Municipality of Euphrasia*, 13 U. C. R. 129 ; *Grierson and the Municipality of Ontario*, 9 U. C. R. 629.

Freeman, Q. C., supported the rule, citing *McMaster and The Corporation of Newmarket*, 11 C. P. 398.

MORRISON, J. delivered the judgment of the Court.

A perusal of the affidavits filed shews very clearly that the merits of the case are entirely with the corporation. It

is quite evident that the by-law 146 is not a by-law, nor was it intended to be one, within the provisions of sec. 226 of the Municipal Act. It is merely a by-law for the raising funds for the ordinary purposes of the municipality for the current year, containing a provision for raising by special rate during the same year an amount necessary to defray the purchase of the site and the expenses of erecting a town hall. Nothing appears shewing in the slightest degree that the Council were not acting *bonâ fide*, or contrary to the wishes of the ratepayers.

The case is quite distinguishable from *McMaster and The Corporation of Newmarket* (11 C. P. 398), relied on by the applicant's counsel. There no provision was made by rate to raise the necessary amount to pay for the site and the erection of the hall, nor were the funds on hand to meet the demand when due, and a debt was contracted which had to be paid by funds during the ensuing year. In that case also the council were acting in defiance of the ratepayers, and a petition signed by a large majority of the electors. In the case before us none of these objections exist. The only ground taken in the rule that can affect these by-laws is the fifth—that the corporation had not surplus funds or moneys in their hands at the time of passing any of the by-laws for the purchase of the site or the erection of the building. As to the other objections, they are pointed at by-laws within the provisions of the 226th section.

Looking at all the circumstances, and considering that the site has been conveyed to the municipality and paid for, that the town hall is erected and accepted by the corporation, and that the funds are in the hands of the Treasurer to meet the contract for its erection, we think that in such a case, although the corporation may not have been strictly regular in their proceedings, we ought to abstain from exercising the discretionary authority given to us by the Municipal Act, and decline to interfere. In so deciding we by no means desire to countenance in any degree non-compliance with the salutary provisions enacted by the Legislature to protect ratepayers against the creating of debts,

and for the proper raising and application of municipal moneys.

We discharge the rule, but not with costs, as we think the applicant had some grounds for questioning the legality of the proceedings.

Rule discharged.

FISHER v. GRACE.

Tenant of land—Action of trespass by—Proof of Plaintiff's interest—Measure of damages.

In action of trespass to land, where the plaintiff is a tenant only the duration of his term must be shewn, the measure of damages being the diminished value of his interest.

The trespass complained of was removing a fence in May, 1866. The plaintiff's landlady swore that she leased the place to the plaintiff in November, 1865, and added, "Plaintiff was my tenant when the rails were taken away, paying so much a year, taxes and statute labor." There was no further evidence as to the nature of the lease or duration of the term.

Held, that the damages should not, as a matter of law, have been nominal only, but estimated on the injury the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession.

TRESPASS, *quare clausum fregit*. Pleas, not guilty, and not possessed.

The trial took place at Goderich, in September, 1867, before Morrison, J.

It appeared that one Mary Henley had recovered her dower against the defendant as tenant of the freehold, and that certain land had been set off and assigned to her as her dower, and she had entered into possession. She proved that she leased the property to the plaintiff in November, 1865, and that he had been in possession since. The trespass was the taking away of the rails which constituted the fence of part of the land in possession of the plaintiff. She was recalled, and said, "Plaintiff was my tenant when the rails were taken away, paying so much a year, taxes, and statute labour." Other evidence shewed

the trespass was in May. No evidence was given to shew whether the lease was in writing or by deed, or by parol, and no other evidence as to the duration of the plaintiff's term.

It was objected, on behalf of the defendant, that on this evidence the plaintiff could only recover nominal damages, as it was not shewn how long he was entitled to hold possession. The plaintiff's counsel then proposed to recall Mrs. Henley, but the learned Judge declined to permit it, as she had been recalled once; and he directed the Jury that the plaintiff was only entitled to nominal damages. They gave a verdict for 1s.

K. McKenzie, Q.C., obtained a rule calling on the defendant to shew cause why a new trial should not be granted, on the ground that the learned Judge had ruled that the plaintiff was only entitled to nominal damages, and had not proved any tenancy which would entitle him to substantial damages, and had refused to allow Mrs. Henley to be recalled, and had refused to submit to the jury the question of a tenancy from year to year.

C. Robinson, Q.C., shewed cause, citing *Twynam v. Knowles*, 13 C.B. 222, and *Mayne on Damages*, 238. He also referred to *Addison on Torts*, 263.

McKenzie, Q.C., contra, cited *Doe v. Amey*, 12 A. & E. 476; *Cox v. Bent*, 5 Bing. 185; *Knight v. Bennett*, 3 Bing. 361; *Doe v. Morse*, 1 B. & Ad. 365; and *Doe v. Watts*, 7 T. R. 83.

DRAPER, C. J., delivered the judgment of the Court.

In an action like the present, the measure of damages is the diminished value of the plaintiff's interest in the property. Hence it is necessary to shew, where the plaintiff is only a tenant, the duration of his term. Mrs. Henley might sue for the injury to her reversion, and, as Mr. Mayne has pointed out, the defendant might be compelled to pay for the same damage twice over, unless the tenant were obliged to shew clearly when his term would

come to an end. He must shew his right affirmatively, must prove that he had the right of possession up to some certain period, and then he would have a right to recover whatever damage the defendant's conduct caused to him for that time. To establish that the relation of tenant from year to year existed between him and Mrs. Henley, was not going far enough in our view, for it was consistent with that relation that she might have given him notice to quit at the end of the then current year of his occupation, *i. e.* some time in November, for the plaintiff's occupation began some time in November, 1865. If she had allowed the time to elapse for giving notice to quit at that time (November 1866), then he would have shewn an interest for another year.

But I do not understand why the plaintiff's counsel did not ask the learned Judge to direct, that as according to the evidence the fence was removed in May, and as the evidence also shews that the plaintiff's right to possession would continue for five or possibly six months afterwards, the damages should be estimated upon the injury the loss of the fence would cause to the plaintiff during that time. No such suggestion appears to have been made, nor anything more than a bare objection to the charge, that the plaintiff was only entitled to nominal damages.

We regret very much that we cannot concur in this ruling, looking at the circumstances, for we cannot but think this action, as brought by a tenant for a few months' damages, is really a trifling one. It may be we are mistaken as to the value of that injury, but the evidence is so meagre that it is difficult to deduce any satisfactory conclusion on this point. We think there must be a new trial without costs.

Rule absolute.

CLARK V. CORBETT, SHERIFF.

Executions—Priority—Partnership—Money had and received.

The plaintiff on the 14th April, 1864, gave the defendant a *fi. fa.* against G., S., and L., the defendant then having a writ against G. and L. *ats.* Hingston, and one against G. alone *ats.* F. On the 20th he received a writ against G. and L., *ats.* Harty. G., S., and L. carried on business as G. & Co., each living at a different place, and S. having authorized L. to act for her in the partnership by power of attorney. The plaintiff's judgment and Harty's were both for partnership debts.

On the 5th February, 1864, the firm made an assignment to E., in trust to pay all their creditors equally. He sold the goods, and on the 14th April, 1864, paid the proceeds to the defendant, who gave a receipt for it "to be applied on executions in my hands against G., and G. et al." E. had previously telegraphed to the plaintiff's attorney for instructions as to whether he should pay this money to the Sheriff, and being told to pay him he did so, and took the receipt, not being aware at the time of any execution but the plaintiff's.

On the 20th April, 1864, Harty notified the defendant not to pay over the money as the plaintiff's judgment was invalid, and on the 19th September following the plaintiff's judgment and execution, and all proceedings subsequent to appearance, were set aside. The plaintiff again proceeded with the action, and on the 4th December, 1864, placed another *fi. fa.* in the defendant's hands, which he returned no goods, having paid over the money to Harty before the plaintiff had recovered judgment. The plaintiff having sued the defendant for not levying, and for money had and received—

Held, that he could not recover: that as to the first count, the execution defendants had nothing in his hands during the currency of the plaintiff's writ, for if the assignment to E. was valid, their estate had vested in him, and if void, they had through E. paid over the money to the defendant, who received it *as Sheriff* for the purpose mentioned in his receipt; and as to the second count, the defendant was entitled to apply this money as specified in his receipt, and was not bound to wait until an execution came to him against all the members of the firm.

DECLARATION.—First Count, that the plaintiff recovered judgment on the 2nd December, 1864, against A. Galbraith, S. Lalanne and E. D. Lalanne, and issued a *fi. fa.*, to the Sheriff on the 4th December, 1864: that there were goods of which the defendant might have levied; but that he did not levy, and falsely returned "no goods."

Second count.—Substantially the same.

Third count.—Held bad on demurrer.

Fourth count.—Money payable by defendant as Sheriff for money lent by the plaintiff to him, money had and received, interest, and account stated.

Pleas.—Not guilty; that there were no goods of the execution defendants; and to the fourth count, never indebted.

The case was tried at Belleville, before Richards, C. J., and a verdict rendered for the plaintiff for \$1110.50, subject to the opinion of the Court.

It appeared that this plaintiff had recovered a judgment against the same parties on the 13th April, 1864, and that a *fi. fa.* thereon was received by the defendant on the 14th. On the 20th April, 1864, a writ in favor of Harty against Galbraith and Edward Lalanne was received by the defendant, and at the same time the defendant had a *fi. fa.* against the same two parties, for one Hingston, and one of *Foster v. Galbraith* alone, the two latter writs being in the defendant's hands before the plaintiff's.

It appeared that a merchant's business was carried on at Napanee, in the name of "Galbraith & Co.," the firm being C. Galbraith, Sophia and Edward Lalanne: C. Galbraith living in Napanee, Edward Lalanne in Montreal, and Sophia in the County of Broome, Canada East. A very full power of attorney was proved from Sophia to Edward, to do everything for her in the partnership. The plaintiff's judgment and Harty's were both for partnership debts.

On the 5th of February, 1864, the co-partners made an assignment of their estate to Robert Easton, to pay all creditors in the schedule annexed, without priority. This was filed next day, in the office of the Deputy Clerk of the Crown.

Easton gave evidence that he sold the goods as assignee, and paid over the proceeds to the Sheriff, \$945. The latter gave a receipt dated 14th April, 1864, for the amount, "to be applied on executions in my hands against Galbraith and Galbraith et al." Easton said some telegrams passed before he paid it. He telegraphed to the plaintiff in Montreal: "Sheriff here. Will I pay him the money on your execution?" Plaintiff answered: "Take advice of McLellan, our lawyer, and follow it." Easton telegraphed accordingly: "The Sheriff is here, and has execution in favor of Clark v. Galbraith. Shall I hand over the money in my hands?" to which the lawyer answered: "Pay over." He did so, and took the Sheriff's receipt. It was the identical money he

received from the goods, and he said he paid it over on the plaintiff's execution, and knew of no other. He was not a creditor of the Galbraith firm. No creditor had applied to him for any money under the assignment until the Sheriff's application, which resulted in his paying over the money.

On the 20th April, 1864, Harty, who had another execution, notified the Sheriff not to pay the money to the plaintiff, as application was about being made to set aside his judgment, and on the 2nd of May Harty required him to pay the money to himself.

By rule of Court of the 19th September, 1864, the plaintiff's judgment and *fi. fa.* were set aside, with costs to be paid by the plaintiff to A. Galbraith.

The plaintiff again proceeded with the action, all proceedings subsequent to appearance having been set aside, and recovered the judgment set out in the declaration, and a *fi. fa.* was delivered to the Sheriff on the 4th December, 1864, to which the Sheriff returned "no goods" on the 1st February, 1865.

On the 28th January, 1865, Easton, as assignee, gave notice to the Sheriff to apply the money received from him in the execution of *Clark v. Galbraith*.

Prior to the plaintiff's recovery of judgment, the Sheriff had paid Harty on his execution..

Jellett, for the plaintiff, cited *Flintoff v. Dickson*, 10 U. C. R. 428.

Gwynne, Q. C., for the defendant, cited *Hobson v. Thelluson*, L. R. 2 Q. B. 642; *Harrison v. Paynter*, 6 M. & W. 387; *Wood v. Wood*, 4 Q. B. 397; *Bell v. Hutchison*, 8 Jur. 895; *Collingridge v. Paxton*, 16 Jur. 18; *Robinson v. Peace*, 7 Dowl. 93; *Masters v. Stanley*, 8 Dowl. 169; *Williams v. Everett*, 14 East 582, *Hutchinson v. Heyworth*, 9 A. & E. 375; *Lilly v. Hays*, 5 A. & E. 548; *Thurston v. Mills*, 16 East 274; *Sewell v. Raby*, 6 M. & W. 23, 25; *Baron v. Husband*, 4 B. & Ad. 611; *Brind v. Hampshire*, 1 M. & W. 365; *Wedlake v. Hurley*, 1 C. & J. 83.

HAGARTY, J., delivered the judgment of the Court.

The plaintiff must fail on the special count for not levying, as there is no proof that there were any goods or chattels of the execution defendants in defendant's hands during the currency of the plaintiff's execution. In the view most favorable to the plaintiff, the Sheriff had before he received the plaintiff's writ executions against two members of the firm, sufficient with fees and expenses to absorb all the money received by him from Easton as the proceeds of the joint estate. This joint estate had been assigned by all the owners to Easton, by an instrument which, if valid, divested all their interest and vested it in Easton. The estate being sold by him the proceeds were in his hands on the trusts of the assignment, and when the plaintiff's writ, (we speak of the valid writ), was received, the execution defendants had neither money or goods on which process against them could attach.

If, on the other hand, the assignment to Easton were void, then the goods remained the property of the assignors, and the proceeds when sold were their moneys. Then they through Easton pay over their moneys to the Sheriff, who received them, as his receipt expressly states, "to be applied on executions in my hands against Galbraith and Galbraith et al.," certainly referring to more than one process. At this time he has the *fi. fa.* of Clark, the plaintiff, (afterwards set aside), and those of Hingston and Foster. Easton said he knew only of the plaintiff's execution, and paid the money for that. The Sheriff's receipt shews the only purpose for which he received the money, viz: to satisfy the claims in his hands. A few days after this he receives Harty's writ and express notice of the invalidity of the plaintiff's judgment and writ, which are soon afterwards set aside, leaving Harty's, Hingstone's and Foster's writs.

We do not agree to the argument that the Sheriff was a personal depositary of this money for the purpose of giving it over to the plaintiff, irrespective of the officer's position as Sheriff acting on execution process. He received it in

our opinion solely in his official character, to be applied on executions in his hands.

When the plaintiff's execution was set aside, the Sheriff could only apply the money on the writs current in his hands. When Hingstone's and Foster's writs were paid, Harty's then came next, and assuming that the Sheriff had, either by levy or otherwise, received a sum of money applicable to executions, the surplus, after paying the two first, would under our Statute be applicable to the next execution in hand, (C. L. P. Act, ch. 22, Consol. Stat. U. C., sec. 261); or if no execution except that set aside, then the money would belong to the person from whom it was levied or received.

We do not see how the Sheriff can be made to hold property or money of debtors to be applied by him on an execution to be given to him at some future period, and not to be operated on by executions already in hand, or received prior to that expected to be issued.

In this view, if the assignment to Easton be valid, he alone can require an account of this money from the Sheriff; if invalid, then the execution defendants would be the persons to sue.

But the plaintiff also argues that his execution was the only one against all the partners, and that the others, though for partnership debts, were recovered only against Galbraith and E. Lalanne; and Sophia Lalanne, the third partner, who was in Lower Canada, was not a party to the suit, and therefore his execution must prevail over those before him.

The case of *Taylor v. Jarvis* (14 U. C. R. 128), not cited in the argument, is most in point. It is there held that a judgment and execution against one of three partners, though for a partnership debt, cannot prevail against a judgment and execution against the three. There the executions were together in the Sheriff's hands. Burns, J. suggests a case most like the present, (page 143): "Suppose that he had sold before the execution against all the partners came to his hands, then upon the plaintiff's execution" (that against all) "he would have sold the remaining interest of

the two partners, and the different vendees would have the goods; the first, to have a division of the surplus, if any, after paying partnership debts; the second, claiming them for a partnership debt. The law would not give the parties any proportions, but they would have to go to a Court of Equity to settle their respective rights."

The case before us stands on the peculiar ground that the Sheriff has not an estate of goods, &c., on which to levy, but a sum of money representing such estate, paid into his hands by Easton, either as the owner of such estate or as the agent of all three partners. He has applied the money to pay claims in his hands before receipt of the plaintiff's execution.

We think it impossible to hold that the plaintiff can be entitled to call this money received to his use.

We cannot hold that the Sheriff was bound to wait in such a case as this till some execution might issue against all the members of the firm. Nor is it easy to see how the latter can be heard insisting on placing the Sheriff in a worse position because their assignee or agent had by their express authority converted the joint estate into money, and paid it into the Sheriff's hands on the terms mentioned in the receipt. But for their act done through Easton, he could have proceeded as suggested by Burns, J., and the accounts would be adjusted elsewhere.

The case of *Garbutt v. Veale*, (5 Q. B. 412), may be also referred to as against the plaintiff's claim for money had and received.

If any person be damnified by the Sheriff's action on the writs, it would rather appear to be Sophia, the partner not included in the prior judgments,—that her interest or her property went to satisfy such judgments.

Our judgment is confined to the parties litigant before us, and we hold that the plaintiff cannot recover against the Sheriff on this record.

Judgment for defendant.

MELLON V. NICHOLLS.

Insolvent Act 1864—Foreigners—Practice.

The plaintiff had been engaged in business in Canada, though not permanently resident there. He was arrested by the defendant, a constable, who took possession of money found on him, and being discharged he sued the defendant for the money. A writ of attachment having issued against him, one M. was appointed official assignee, and applied under sec. 4, sub-sec. 9 of the Insolvent Act of 1864, to be allowed to intervene and represent the plaintiff in the suit. The plaintiff objected, contending that as a foreigner he was not liable to the Insolvent laws.

The point being one of great practical importance, raised for the first time, the Court, with a view to have it properly brought up, left the assignee to sue the defendant for the money, so that the defendant might apply under the Interpleader Act, and the question be presented on the record in a feigned issue.

J. B. Read obtained a rule calling on the plaintiff and defendant to shew cause why Richard Monck, Official Assignee for the County of Kent, should not be allowed to intervene and represent the plaintiff in this suit, as assignee of the plaintiff, an insolvent, according to the Insolvent Act of 1864, and to change the plaintiff's attorney.

It appeared that the plaintiff had been engaged in oil operations in this country, living although apparently not a permanent resident therein: that on the 12th of October, 1866, the defendant, who was Chief of Police in Hamilton, was requested by telegraph from Bothwell to arrest the plaintiff, a passenger in the train, on a charge of stealing. He did arrest him, and found with him a large quantity of money in United States currency, and certain securities, all enumerated in a schedule filed by the defendant. Next day the plaintiff was removed in custody to Bothwell, and in two or three days afterwards was discharged.

The defendant swore that on the 15th October, and before any demand was made on him by the plaintiff, he was notified by the Sheriff of Wentworth that an attachment in Insolvency was issued against the plaintiff at the suit of John and William McKeown:

That on the next day an order for the property seized was presented to him by Mr. Start, as attorney for the

plaintiff, which he declined to obey, alleging the notice of the attachment.

On the 18th October, a summons at the plaintiff's suit was issued and served on the defendant in this action of trover for the money, and a declaration subsequently served, but no plea yet filed.

A writ of attachment was issued on the 11th October, 1866, and received by the Sheriff on the 16th October. On the 8th December, 1866, Richard Monck was appointed assignee.

Another affidavit of the defendant, sworn on the 23rd October, 1866, disclaimed any right or interest in the property seized, and denied all collusion with either party, and expressed his readiness to bring into Court the said property. An interpleader issue was asked for by him, but he failed to obtain it. No suit had been brought against him but this.

The interpleader summons was enlarged to term, on terms of the defendant bringing the property into Court. This was not done, nor was the Court applied to, and in March, 1867, a summons was granted to the same effect as the rule now moved, and this was enlarged by the Chief Justice of the Common Pleas to the full Court, and thus brought here.

The application was founded upon sec. 4., sub-sec. 9, of the Act, which declares that the assignee "may intervene and represent the insolvent in all suits or proceedings by or against him, which are pending at the time of his appointment, and on his application may have his name inserted therein, in the place of that of the insolvent.

The application was resisted by the plaintiff, on the ground chiefly that he was not liable to our Insolvent law, being a foreigner neither resident nor domiciled in Canada.

J. A. Boyd shewed cause during Michaelmas Term, citing *Re Rogers*, 9 Ir. Chy. Rep. 150, *Re Sanderson*, 11 Ir. Chy. Rep. 422; *Arch. Bankrupt Law*, ed. of 1867, 91, 92: *Cook's Bankrupt Law*, 8th ed., 79, 81.

Anderson and *J. B. Read* supported the rule, and cited *Westlake's Private International Law*, sec. 289.

HAGARTY, J., delivered the judgment of the Court.

This point is one of great practical importance, and is raised for the first time since the passing of the Act, which contains no provision extending its operation expressly to aliens and denizens.

The Court is most reluctant to decide such a matter on motion, and after much consideration has come to this determination, with a view to having the question properly raised.

The assignee has not instituted any suit against the present defendant, and for all that appears does not desire so to do. We cannot force the defendant to raise this defence if we substitute the assignee's name for that of the now plaintiff, and so the alleged insolvent might not be able to test its validity; and there may be a difficulty in his applying to set aside the insolvency proceedings, in consequence of the lapse of time.

We think the better course is to leave the assignee to commence an action against Nicholls, the defendant, for this property. The latter can then apply under the Interpleader Act, and on his bringing the money and securities into Court to abide the event, an order may be made calling on the assignee to appear, &c., and under sec. 2 of the Act, (Consol. Stat. U. C. ch. 30) a feigned issue can be framed and proper directions given for the trial. This will give full opportunity for raising the principal question on the record

We reserve the question of costs on this rule till next term, with the intimation that if the course suggested here be not taken by the parties, the Court will probably give the present plaintiff his costs. We also direct that the defendant Nicholls have two weeks further time to plead.

KERR ET AL. V. McEWAN.

Arrest on Ca. Sa.—Form of bond to Sheriff—Amount of penalty—Waiver
—C. S. U. C. ch. 24.

Plaintiffs sued the Sheriff for the voluntary escape of M., taken under a *Ca. Sa.* at their suit; and, in a second count, charged that the defendant took from M. a bond in a penalty not double the amount for which he was confined, and the sureties not being sufficient, as defendant well knew, and that the defendant fraudulently, wilfully, and corruptly released M. from custody on receiving such bond.

The penalty was in double the amount of debt, costs, and costs of executions, but not including interest to the date of the bond or Sheriff's fees; and there was no affidavit of execution or justification of the sureties with the bond. It appeared, however, that fourteen months after M. had been released by the defendant, the plaintiffs took an assignment of the bond, which had not been allowed, and recovered judgment on it in their own names against the sureties. The jury having negatived the scienter and fraud—

Held, that the plaintiffs had waived the objections to the sufficiency of the sureties, and to the bond, for they must have been aware of the objections to the bond when they took the assignment, and that it had not been allowed.

Seemle, that the omission to include interest, if essential, is a matter to be considered by the County Court Judge on the application for allowance, on which his decision is final.

The omission of Sheriff's fees was immaterial, for if he was liable for an escape the plaintiffs could not recover them unless they had paid them, which was not pretended here.

DECLARATION.—The first count was for the voluntary escape of Henry Mears, taken on a *Ca. Sa.* issued at the suit of the plaintiffs. The second count charged that after the arrest of Henry Mears on the *Ca. Sa.*, the defendant took from him a bond, conditioned according to the provisions of the Statute, with George Jessup and Margaret Mears as sureties, in a penalty of £396 2s.; "the said sum not being double the amount for which Henry Mears was so confined," and the sureties not being sufficient, as the defendant then well knew. Averment, that the defendant fraudulently, wilfully, and corruptly released and discharged the said Henry Mears from custody under the said writ, upon receiving the said bond with such insufficient sureties.

The defendant pleaded that while Henry Mears was in custody under the *Ca. Sa.* he tendered to defendant, who

took from him, a bond with George Jessup and Margaret Mears, two sufficient sureties, in a penalty double the amount for which H. Mears was confined, conditioned, &c., and upon receipt thereof, with an affidavit of a subscribing witness thereto of the due execution thereof, defendant allowed H. Mears to go at large: that the plaintiffs afterwards, and after breach of the condition, required the defendant, as Sheriff, to assign the bond to them, and he duly assigned the same, and delivered it with the assignment to the plaintiffs, who accepted it and afterwards recovered judgment thereon, in their own names, against Jessup and Margaret Mears. Issue.

The case was tried at Chatham, in October, 1867, before Morrison, J.

The defendant put in the *Ca. Sa.* on which Henry Mears was arrested. It issued on the 23rd of September, 1861, for £193 9s. 3d., and was endorsed for £177 8s. 6d., debt, £16 0s. 9d., taxed costs, with interest from the 20th November, 1859, £4 11s. 9d., for writs of execution; and was returned *cepi corpus*. He also put in a bond, dated 3rd October, 1861, made to him as Sheriff by Henry Mears, George Jessup, and Margaret Mears, in a penalty of £396 2s., conditioned as the Statute required, and an assignment thereof to the plaintiffs, dated 9th December, 1862. He further put in an exemplification of a judgment, entered 15th January, 1863, in an action brought by the plaintiffs upon that bond against the obligors, and gave some evidence to shew that the sureties were sufficient.

The plaintiffs' counsel objected that the bond was insufficient, not being for double the amount endorsed on the *Ca. Sa.*: that no affidavit of its execution nor of justification by the sureties was proved.

The learned Judge held that the case must go to the Jury on the second count, and therefore, in the event of a verdict for the defendant upon that count, he reserved leave to the plaintiffs to move to enter a verdict for the amount claimed, if the Court should be of opinion that the taking of the bond did not constitute a defence. The plaintiffs then went into evidence to shew the in-

sufficiency of the sureties, and that the defendant did not require them to justify.

At the close of the case, the defendant's counsel moved to add a plea that the cause of action did not accrue within two years (see Con. Stat. U.C., ch. 78, s. 7). The learned Judge did not grant it, not being satisfied that he should do so. The defendant's counsel further applied for leave to add a plea of not guilty as to the second count. The learned Judge did not permit it, as in reality the case went to the Jury as if such a plea was upon the record, the question submitted to them being whether the defendant, knowing the insufficiency of the sureties, wilfully, fraudulently, and corruptly took the bond and released the debtor.

The jury found for the defendant.

Hector Cameron obtained a rule calling on the defendant to shew cause why the verdict rendered in his favour should not be set aside, and a verdict entered for the plaintiff on the first count for £279 14s., pursuant to leave reserved, because the bond taken by the defendant not being conditioned in double the amount for which the debtor was in custody, and there being no affidavit of due execution accompanying the same, the defendant was guilty of an escape; or for a new trial, on the ground of misdirection in the learned Judge, in telling the Jury that on the issue raised by the defendant's plea to the second count the defendant was entitled to succeed, unless he knowingly, wilfully, and corruptly took insufficient bail, whereas the real issue was whether the bail were sufficient; and because the verdict was against evidence, which shewed that the bail were insufficient, and that the defendant well knew the same.

M. C. Cameron, Q.C., shewed cause.

DRAPER, C.J., delivered the judgment of the Court.

The gist of the plea is, that the Sheriff took a bond according to the Statute, and allowed the debtor to go out of custody, and that the plaintiffs took an assignment

of that bond; and, according to the rule and the argument of the plaintiffs' counsel, the question at issue was the sufficiency of the bail. The proof was that the Sheriff on receiving the bond put in did allow the debtor to go at large, after which the plaintiffs did take an assignment and recovered judgment on the bond against the sureties, bringing the action as assignees.

If the bond is legally sufficient, the first count is answered. The plaintiffs insist that it is not a good bond within the Statute, because, 1st., it is not taken in a penalty double the amount for which the debtor was confined, as the 25th sec. of the Act requires (Con. Stat. U. C., ch. 24); 2nd., because there was no affidavit of due execution accompanying the same.

As to the first, in the body of the writ the amount to be satisfied is £193 9s. 3d., but it is endorsed to detain for £177 8s. 6d. debt, £16 0s. 9d. costs, interest on both sums from 20th November, 1859, £4 11s. 9d. for executions, besides the Sheriff's own fees. The debt, costs, and costs of executions amount together to £198 1s, exactly half the amount of the penalty, and the plaintiffs' contention is that the interest to the date of the bond should have been computed, as well as the Sheriff's fees, and the penalty increased accordingly.

As to these fees, if the Sheriff were liable for an escape, the execution creditor could not recover them from the Sheriff unless he had paid them, which it is not pretended the plaintiffs had done.

The question as to the interest requires consideration. Under the 25th section of the Act (which section, in *Kingan v. Hall*, 23 U. C. R. 511, we held was not repealed by the 29th section) and under the 27th section the bond may be allowed by the Judge of the County Court of the County where the debtor is confined. If the allowance be made, and endorsed on the bond, the Sheriff is discharged respecting the debtor's custody, unless he should be again committed. The creditor must, however,

have four days' notice of the motion for allowance, and may object to the sufficiency of the sureties.

If this bond had been allowed, the only objection raised being to the amount of the penalty, we should have felt it very difficult to hold that the Sheriff remained liable. To come to that conclusion, it would be necessary to hold that a defect in the penalty, no matter how small, made the bond wholly void as a bond within the Statute. We think there is no need of apprehension that the Judge would allow a bond where the penalty was not substantially in compliance with the Act, and we do not mean to decide that the accrued interest is not to be considered in fixing the amount of the penalty. But it is, as we incline to hold, one of the matters to be considered by the County Judge, from whose decision, allowing or disallowing, there is no appeal.

This bond, however, was never allowed, and the question is whether, after taking an assignment and recovering judgment on it in their own names, the plaintiffs can maintain an action against the Sheriff for the escape of their debtor. Passing by the allegation in the second count as to the fraudulent release of the debtor, may not the Sheriff insist that under the 33rd section of the Act he is discharged by the assignment to the plaintiffs, and the judgment recovered by them?

When they took the assignment, fourteen months after the bond was given, they must have known it was not allowed, and therefore that the sufficiency of the sureties had not been adjudged. They saw also that there was no affidavit of the solvency of the sureties annexed, and that the bond was not accompanied by an affidavit of the due execution, according to section 28. If the bond was void, then, as held in *Kingan v. Hall*, taking an assignment would not relieve the Sheriff. Still, it must be remembered that under a *ca. re.*, an acceptance of an assignment of the bail bond to the Sheriff was an admission of the sufficiency of the bail. *Anon.* (1 Salk.

97), *Fish v. Horner* (7 Mod. 62), *Grovenor v. Soame*, (6 Mod. 122), 2 Wms. Saund. 61 (*n*). But the plaintiffs have acted on the assignment, and have got a judgment on the bond in their own names, altering the nature of the security, and depriving the Sheriff of the power to endeavour to resort to it for his own indemnity.

The bond is good on its face. The objection to the amount of the penalty can only be sustained by reference to matters *dehors* the bond, and the absence of the affidavit of due execution comes with a singular ill grace when the plaintiffs have got a judgment on it.

Moreover, the second count is not framed to meet the case of a bond void because not complying with the requisitions of the Statute. The complaint is that the Sheriff knowingly took insufficient bail and discharged the debtor, in fraud of the plaintiffs. The jury have negatived the scienter and the fraud. We think the objection as to the insufficiency of the bail, though there was strong evidence to sustain it, was waived; it came too late.

On the whole, we consider the bond sufficient on the face of it. We think that by taking an assignment knowing, as they must be taken to have known, that the penalty did not cover double the amount of the accrued interest and Sheriff's fees, in addition to debt and costs, that no affidavit of solvency of the sureties or of due execution was annexed to or accompanied the bond, and having recovered judgment upon it, the plaintiffs are to be treated as if the bond had been allowed, and therefore (the charge of fraud being negatived by the verdict) the plaintiffs cannot succeed in their application to have the verdict entered for them; nor do we think, under all the circumstances, there should be a new trial.

Rule discharged.

DEADMAN v. EWEN.

Subpœna—Non-attendance—Witness fees—Attachment.

A County Court Judge being served with a subpœna *duces tecum* to produce a deed, did not attend; and on motion for an attachment excused his absence on the ground of important private business, urging also that he obtained the deed and became possessed of his information as an attorney, that he had a lien on the deed, and that he was entitled to witness fees as an attorney.

Held, that he was not so entitled, and should have attended; and the rule was made absolute.

Kerr obtained a rule calling upon Henry McPherson, Esquire, to shew cause why a writ of attachment should not issue against him for disobeying or neglecting to attend upon a writ of subpœna, issued out of this Court in this cause, on the 14th May, 1867, commanding him to appear before the Judge of Assize for the County of Grey, forthwith after the service, and so on from day to day until the cause should be tried or otherwise disposed of, to testify those things which he knew in this cause, on the part of the defendant, and to produce a certain deed (described), on the ground that his testimony was necessary and material for the defendant, as also was the production of the said deed.

It was sworn that the writ of subpœna was personally served on Mr. McPherson, at his residence in Owen Sound, the assize town, on the 14th March; that he was paid \$2.25; that the original writ of subpœna was shewn to him when a copy was delivered; that at the time of such service he had the deed in question in his possession; that the cause was tried on the 17th of May, and a verdict was rendered for the plaintiff; that the action was trespass *quare clausum fregit*, and the pleas put the plaintiff's title in issue; that this deed was necessary to defeat the plaintiff's claim; that the said McPherson, though duly called on his subpœna, did not appear, nor was the deed he was required to produce produced at the trial.

McLennan shewed cause. All intentional contempt was disclaimed, and Mr. McPherson's absence was accounted

for on the plea of important private business requiring his attendance elsewhere, and that it would have caused him loss and additional trouble if he had not attended to it. It was further sworn that he had been employed professionally as an attorney when he got possession of this deed, and that it came into his hands as such attorney, and that all the facts he could depose to in this suit came to his knowledge in that capacity, and that he claimed a lien on this deed for costs, and also claimed that he ought to have been paid witness fees in that character, and not those of an ordinary witness. He was not, however, and had not been for some time before this trial a practising attorney, but held an office which entirely prevented his practising being Judge of the County Court for the County of Grey.

Kerr, in support of the rule, cited *Thompson v. Mosely*, 5 C. & P. 501; *Corsen v. Dubois*, Holt 239; *Jackson v. Seager*, 2 D. & L. 13; *Goff v. Mills*, 2 D. & L. 23; *Doe Butt v. Kelly*, 4 Dowl. 273; *Maunsell v. Ainsworth*, 8 Dowl. 869; *Regina v. Lord John Russell*, 7 Dowl. 693; *Lush Prac.*, 528, 532, 335-6.

McLennan, contra, cited *Doe Loscombe v. Clifford*, 2 C. & K. 448; *Doe Gilbert v. Ross*, 7 M. & W. 102; *Kemp v. King*, 1 C. & Marsh. 396; *Dicas v. Lawson*, 1 C. M. & R. 934.

DRAPER, C. J., delivered the judgment of the Court.

We do not question the sincerity of Mr. McPherson's disavowal of any intended contempt of this Court, while we regret to be under the necessity of holding that his disregard of the writ of subpoena, which he does not deny, is not justified on either of the grounds on which he puts it. First, the fees tendered, and which he accepted without objection, were enough, unless he could claim to be paid as professional men in the practice of their profession are entitled to be paid. We do not think he could so claim; and as to the evidence he might be asked to give, or the production of the deed, he should have attended according to the exigency of the writ, and the Court would have

stopped an improper question, and would have protected any lien he had.

We feel bound, therefore, to make this rule absolute, but the writ of attachment is not to issue for a month, and then only in case he has not paid the costs of this application. This decision leaves any question between him and the defendant unaffected.

Rule absolute.

MARY GOURLAY V. HELEN GOURLAY.

Dower—Practice—Service of declaration—Costs.

Plaintiff in dower having served a demand on defendant, the tenant of the freehold, residing in Scotland, served the declaration and notice to plead on the tenants in possession of the land, and on this entered judgment by *nil dicit* against the defendant for seizin and costs, and issued execution. The Sheriff delivered possession according to the report of the commissioners appointed, under 24 Vic., ch. 40; and their fees, including the charge of the surveyor employed by them, amounted to \$266. An order was afterwards made to refer this charge to taxation, on a summons calling on the Sheriff and the commissioners and surveyor, but not on the plaintiff.

Held, that the judgment was irregular, and must be set aside, for service of the declaration on the tenants of the land could not enure as a service on the defendant, the tenant of the freehold.

Semble, under the Dower Act, the tenant of the freehold can be sued only when within the jurisdiction; if out of it, then a mere occupier may be sued, but a recovery against him will not bind the right of the tenant of the freehold.

Quere, as to the demandant's right to sign judgment by default for the costs; but assuming such judgment to be valid, *Held*, that the costs of the commissioners, under 24 Vic., ch. 40, would be recoverable against defendant.

Held also, that the order to refer could not be sustained, for the defendant should have been a party to the summons.

ON the 8th September, 1866, a rule was granted in the Practice Court, calling on the demandant to shew cause why the writ of execution against lands in this cause, and all proceedings thereon, and the order of the Hon. Mr. Justice Morrison, dated 24th April, 1865, and the taxation, and all proceedings thereunder, should not be set aside, because, 1. No summons or other notice of the

application for said order was served on the said tenant, or her attorney or agent, but the said order was made as between parties none of whom had any interest in opposing the same. 2. The Judge had no power or jurisdiction to make the order. 3. The taxation and other proceedings under the order were had *ex parte*, or as between parties none of whom were interested in keeping down the amount, and no notice of such taxation, or any other step or proceeding, was served on the said tenant, or her attorney or agent. 4. The amount for which said execution is endorsed is excessive, and no fees are allowable under the late Dower Act, 24 Vic., ch. 40, to commissioners and other officers for the assignment of dower, there not having been any tariff of fees promulgated or established under the said Act; Or why the judgment herein, and all subsequent proceedings should not be set aside, on the ground of no service or no proper service of the declaration in dower, or of notice of the subsequent proceedings herein, or on the ground of no affidavit or other evidence being filed proving such services; Or why the amount endorsed on said execution against lands should not be reduced to the sum of \$81.89, or to such other sum as may seem meet—upon reading the affidavits and papers filed; and in the meantime proceedings on the execution were stayed.

From the papers put in it appeared that on the 5th February, 1864, an action of dower was commenced, by filing a declaration, in which Mary Gourlay demanded against Helen Gourlay the third part, &c., as her dower of the endowment of Robert Fleming Gourlay, heretofore her husband. The declaration averred that notice in writing demanding the dower was duly served on Helen Gourlay, tenant of the freehold, more than one calendar month and within one year previous to the commencement of this suit, yet the said Helen had never offered to assign. On this declaration judgment was entered against Helen Gourlay, by *nil dicit*, adding

to the usual form that the defendant does not deny the due service of notice in writing demanding the dower; wherefore it is considered that the said demandant recover her seizin of the third part, &c., and also \$81.89 for her costs of suit.

This judgment was entered on the 12th May, 1864, on which day a writ was issued to the Sheriff of Oxford to deliver to the demandant seizin of the said third part, and to make (besides the costs of executing that writ) \$81.89, the costs recovered; to which, on the 6th September, 1864, the Sheriff returned, that having read and examined the report of John W. Nesbitt, William Grey, and George Washington Whitehead, commissioners by him appointed under the said writ and the Act of Parliament in that behalf to admeasure the said dower, he did ratify and confirm their report and admeasurement; and he further returned that on the 21st and 22nd June, 1864, he did deliver possession of the lands described in the commissioner's report, and that defendant had no goods.

An account of the commissioner's charges was also put in, including the charge for 'the surveyor employed by them to make admeasurement of the dowry, with his chain bearers, &c., total \$266, off which \$13 was taxed by the master in pursuance of the reference made to him by the following order:—

Mary Gourlay, *Demandant*. v. Helen Gourlay, *Tenant*.

Upon reading the summons issued in this cause at the instance of the demandant, on the 12th day of April instant, upon the Sheriff of the County of Oxford and the Commissioners and Surveyor appointed by him or acting under the writ of Assignment of Dower in this cause, and the affidavit of service thereof, and the enlargements thereof, and now upon hearing all the said parties by their agents, I do order that the bills of fees, charges and disbursements of the said Commissioners and Surveyor under the said writ, and mentioned in the affidavit filed, be referred to the Master of this Honorable Court,

at Toronto, for taxation, and that the said Master do certify the amount when taxed to the said parties respectively upon said bill. April 24th, 1865.

This was the order moved against.

An affidavit of Mr. Freeman was also filed, that he was consulted by William Smith, agent for the defendant, just before the commencement of this action, and acted as the legal adviser and attorney in the interest of the tenant: that the demandant's right to dower had never been disputed: that he was advised and believed no notice or any other paper or proceeding had been served on the tenant since the demand of dower: that the tenant resided in Scotland; that the *fi. fa.* lands now in the hands of the Sheriff did not come to his knowledge until some time since last term (Trinity Term, 1866), nor as he believed to the knowledge of the tenant or her agent, nor till about that time did he know of any of the proceedings since the demand of dower, all such proceedings being to the best of his belief *ex parte*: that he had no knowledge of the existence of the order of Morrison, J. until about two weeks before the 8th September, 1866: that the lands of the tenant were advertised under the said execution.

In answer, copies of the declaration, of the notice to plead addressed to defendant (of the City of London, England), of the affidavit of service upon fifteen persons named, who were described as tenants in possession of different parts of the lands mentioned in the declaration, of an order of Mr. Justice John Wilson, that such service be deemed good and effectual, as if it had been personally made upon the above named tenant, of an affidavit of the demandant (of no moment), of an affidavit of Charles Donald Dallas, of an affidavit of Charles P. Higgins (that no plea was filed) of the writ to deliver seizin and *fi. fa.* for costs, were all put in.

The affidavit of Charles D. Dallas, a clerk in the office of the plaintiff's attorney, stated that the sum of £3 5s. 2d., sterling, was charged by Messrs. Douglas and Smith, of the

City of Edinburgh, Scotland, for the service of the demand of dower in this cause, and that he on the 14th April, 1864, enclosed a draft on London for said amount to said Douglas and Smith, in a letter marked to their address, post paid, and placed it on that day in the Post Office, Toronto.

An affidavit of James Cook stated that in November, 1863, he served a demand of dower on behalf of demandant, "in the lands in which dower was claimed herein," on John Smith, agent of the tenant.

The demandant made oath, that before and at the commencement of this suit the lands in which she claimed dower were occupied by tenants of Helen Gourlay, the tenant, and that one John Smith was her agent: "that more than a month and within one year from the commencement of this suit, I caused at a considerable expense a demand of my said dower to be personally served in Britain on the said Helen Gourlay, and also caused a copy of duplicate of such demand to be served on her said agent in Dereham." The affidavit proceeded to state what was done afterwards: that judgment was entered, writ of assignment and *fi. fa.* was duly issued, that the Sheriff duly appointed commissioners and a surveyor, what they did and their claim, the application for a taxation of their charges, that she had the sums allowed paid to the commissioners and surveyor before possession could be obtained, which was delivered by the Sheriff about the 21st June, 1864: "That I am advised and verily believe that all the proceedings in this cause have been regularly taken, and I submit that my right to dower having been established by action, I am entitled to the costs of such action, as also to all the costs of assignment of my said dower." This deponent was illiterate, and made her mark to this affidavit. The jurat stated that the affidavit was read over by the commissioner to her, and that she seemed perfectly "to understand the same, and in testimony thereof subscribed her mark thereto in my presence."

The report of the commissioners, their charges, the order

to tax them above set forth, the taxation and certificate thereof, as well as affidavits from the Sheriff and surveyor employed, were also put in.

An affidavit of James Cook stated that he served copies of the declaration and notices according to the Statute, on all the tenants on the said lands, being tenants of the said Helen Gourlay.

James Paterson shewed cause, and cited *Burch v. Pointer*, 3 M. & W. 310; *Bolton v. Manning*, 5 Dowl. 769; *Harris v. Morden*, 17 U. C. R. 278; *Taylor v. Murray*, 3 M. & W. 141; *Card v. Lount*, 2 P. R. 72,

Spencer supported the rule, citing *Street v. Dolsen*, 2 P. R. 306.

The Statutes cited are referred to in the judgment.

DRAPER, C. J., delivered the judgment of the Court.

The first branch of this rule asks to set aside the writ of execution against lands and the proceedings thereon, and the order of Mr. Justice Morrison, with the taxation of costs and the proceedings thereunder. Then there is an alternative, namely, to set aside the judgment and all subsequent proceedings for want of proper service of the declaration or of notice of the subsequent proceedings, and for want of proof of these services; and then, lastly, to reduce the sum indorsed on the execution to be levied to \$81.89.

It is not pretended that the declaration was served on Helen Gourlay, the defendant, for it is shewn that she resided out of the jurisdiction. The service must therefore have been made on the tenant of the land, (Consol. Stat. U. C., ch. 28, sec. 3.) The argument for the demandant is necessarily this: that a declaration in dower against the (assumed) tenant of the freehold may be served on the tenant of the land, and will enure as a service on the tenant of the freehold. We do not think that argument well founded.

Nothing can be clearer than that the tenant of the freehold is the proper person to assign dower, and to be sued for it, and even a disseisor or an abator who is in as of

freehold may assign dower. To provide for a service on the tenant of the freehold is consistent with principle and practice. And if the Legislature had provided that where personal service could not be effected, some other act or acts should be equivalent to personal service, it would be consistent with the carrying on the suit against the tenant of the freehold.

But it is clear that this was not the intention of the third clause, for after providing that service may be made on the tenant of the *land* of which dower is demanded, it proceeds: "and if such tenant do not plead agreeably to the notice," the demandant may proceed as in personal actions. "*Such* tenant," on a reference to the last tenant named, is the tenant of the land. It cannot be successfully contended that "such" refers to the tenant of the freehold, for if the section meant that, then the alternative service on the tenant of the land meant on the tenant in possession holding under the tenant of the freehold; and yet, on referring to the ninth section of the Act, it is plain that it was intended dower might be recovered against a "mere occupier of the land," and the only provision for service of the declaration on a mere occupier is the one contained in the third section, when the tenant of the freehold is not within the jurisdiction.

Moreover, the notice, the form of which is given in the third section, is more consistent with the construction that the person served as tenant of the land is to be the defendant in the action. "Unless you plead," &c., judgment will be signed "against you," are expressions more suited as a warning to the party served, than to a party not within the jurisdiction, and between whom and the tenant of the freehold there may be no relation or community of interest whatever.

The eighth section does not in our opinion affect this construction. It is no more than the duty imposed in actions of ejectment on a tenant, to give immediate notice to his landlord that he has been served with a writ to eject him. Such writ is addressed to the tenant in possession, and is served upon him. This section makes it the duty of

the tenant of the land, against whom in that character an action of dower is brought, to give immediate notice to his landlord, if he holds the land as tenant to another. It would in our opinion be a very forced inference from this section, to hold that the declaration referred to therein is one against the landlord who is out of the jurisdiction.

If the foregoing observations are correct, the declaration in this case has never been served upon the tenant of the freehold, conceding for argument's sake that the affidavit of James Cook filed on the argument, in which he swears he served the tenant on the said lands, being tenants of the said Helen Gourlay, is correct. In the affidavit of service made before judgment was signed he speaks of the several parties whom he served as tenants in possession.

The construction we put upon the Statute is that it provides a mode of service, *i. e.*, personal, on the tenant of the freehold if within the jurisdiction, and very probably intends that if the tenant be within the jurisdiction no one else can be sued. But if not, then the tenant of the land, though only an occupier without right, may be sued (sec. 9), and a recovery had against him, though such recovery apparently will not bind the right of the tenant of the freehold.

It is true that in the sixth section the words "tenant of the land," must, (as we read that with the preceding action, be interpreted tenant of the freehold. This certainly shews that the Act has not been as carefully framed as it might have been, but both the fifth and sixth sections relate to vacant lands. We are not called upon to say how service other than personal can be effected on the tenant of the freehold, for we find only a provision for personal service on him or on the occupant, which is the only construction we can put on the words tenant of the land in the third section. I shall not contend that the same words in the sixth mean occupant, when the section is applicable to lands which are vacant. We think the object of the fifth section escaped attention, when the service made in this case was allowed by a Judge at Chambers.

I confess that I should have thought the right to sign

judgment by default for costs presented an arguable question, and that much might have been urged against the course taken by the demandant in entering a judgment for costs, which according to the words of the seventh section are to be allowed "in case it appears on the trial that a demand in writing has been made of the dower claimed from the tenant one month before action brought and that the action was brought within a year from such demand." It is apparently conceded by Mr. Freeman's affidavit that a demand was made, but we have not discovered among the papers any statement of the time when. However, this point is not taken, but the application to reduce the costs applies only to those which arise after judgment, and relate to the proceedings under the Act 24 Vic. ch. 40. If the judgment is sustained, we think the costs incidental to these proceedings are recoverable against the defendant, against whom the recovery is had. The 13th section of the Act, to my mind, disposes of this point.

The order of my brother Morrison, is, however, objected to. We scarcely understand why, for if it was irregular or *ultra vires* the defendant sustains no prejudice by it. It appears to us that as a matter of practice it cannot be sustained, because it was made without giving the defendant an opportunity of being heard. The demandant takes out a summons calling on the Sheriff and commissioner to shew cause why their charges under the Statute should not be taxed. The defendant is liable (assuming the recovery valid), to pay these costs, and we think was a necessary party to the proceeding.

The result in our opinion is, that this judgment cannot be supported, and therefore, with the subsequent proceedings thereon, must be set aside.

Rule absolute.

LINK V. HUNTER.

Deed—Construction—Implied covenant—Excessive damages.

An indenture between the plaintiff and defendant recited that defendant was the owner and occupier of certain timber limits, and had agreed to sell to the plaintiff all the square timber growing there of a specified length, for \$1,000, the receipt of which was acknowledged, and witnessed that the plaintiff "had a right to cut, make and draw off the said timber until the 15th April next, and not longer."

Held, Hagarty, J., doubting, that taken altogether the instrument contained a covenant by defendant that he owned the limits, and had power to sell and give the plaintiff a right to remove the timber.

The first count was on this covenant, the second for a fraudulent representation of ownership, &c., which was not proved. The jury found a general verdict, for \$1800, which upon the evidence was excessive; and on these grounds a new trial was granted.

COVENANT.—The first count in the declaration stated that the defendant by indenture agreed to sell all the timber of a certain size growing upon certain lands and timber limits, and covenanted that the defendant was owner and occupier of said timber limits, and had power to sell said timber and to grant to the plaintiff the power to cut and remove it; and the plaintiff in consideration thereof paid him \$1,000, and expended a large sum in preparing and in cutting and removing the timber,—yet the defendant was not owner of a large portion of the said timber limits, to wit, of, &c., and had not power and authority to sell the timber or to grant to the plaintiff the right to remove it, whereby defendant lost, &c.

Second count: for fraudulently representing to the plaintiff that he, the defendant, was the owner and occupant of the aforesaid timber limits, and had power, &c., as in the first count, whereas the defendant was not, &c., and the plaintiff paid the defendant \$1000, which he wholly lost, as well as the timber and the plaintiff's expenses about cutting, marking, drawing and rafting the same, and was obliged to pay damages to the owner of the timber, &c.

Third count: for money received by the defendant for the plaintiff's use, and for money paid by the plaintiff for the defendant.

Pleas.—To the first count, *non est factum* ; to second count, not guilty ; to third count, never indebted, and set-off.

The trial took place at Cobourg, in October, 1867, before Richards, C. J.

In support of the first count, the plaintiff proved the execution of an indenture, dated 5th November, 1866, made between himself and the defendant, which recited that the defendant was the owner and occupier of certain timber limits in the township of Galway, in the County of Peterborough, and “has agreed to sell” to the plaintiff, describing him as the party of the second part, all the square timber then growing on said limits that would average seventy-five feet when measured, together with any other square timber he might then own in the townships of Galway and Snowden, save and except lots 6, 7, and 8, in the 18th concession of Galway, and lot 1 in the first concession of Snowden, for the sum of \$1000, the receipt of which was thereby acknowledged. “Said timber limits can be better described as follows: In Galway, [these two words being written in the margin], 11th con., lots 4, 5, 6, 7, 8; 12th con., 4, 5; 13th con., 4, 11; 14th con., 8, 9, 10, 11, 12; 15th con., 8, 9, 10, 11, 12; 16th con., 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16; 17th con., 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16; 18th con., 2, 3, 4, 5, 17.

Township of Snowden, 1st con. 6, 7, 8; 5th con., 9; 6th con., 12, 13, 14; 7th con. 12, 13; 2nd con., 5; 3rd con., 3.” It was then added: “Now, therefore, this indenture witnesseth that the party of the second part has a right to cut, make and draw off the said timber until the 15th day of April next, and not longer. This indenture is also made on the express condition that when the squared timber is made and measured, it must average seventy-five feet all round.”

The subscribing witness to this agreement, who also drew it, proved that at the time of executing it the defendant said he only sold his claim in the Snowden lots, but he had the right to the Galway lots. The limits referred to in

the agreement were known as Buck's limits. The defendant had a timber license, dated 4th September, 1866, which expired on the 30th April following, to cut timber on certain lots in Galway, but this did not include all the lots mentioned in the agreement. Plaintiff's men made upwards of 180 pieces on lots 16 in the 16th concession, 12, 13 and 15 in the 17th concession, and on 17 in the 18th concession of Galway, neither of which lots were included in the license. The timber so made, after it was hauled out on the ice was claimed and taken by Campbell and Hunter, on a writ of replevin. They had the right to timber off these lots. When the defendant was spoken to about this he insisted on his title.

Before the agreement was made the plaintiff's brother had said there was not sufficient timber on the lots the defendant was offering, and the defendant asked him if he had, been east of a certain lake on 15 and 16 in the 16th concession, 15 and 16 in the 17th concession, and some other lots. The plaintiff's brother had not, but he went, and then was satisfied. The defendant said as to these lots he had a right to sell them; that he had bought some of them, and the others were in the license, and the brother swore at the trial that but for these lots 16 in the 16th concession, and 15 in the 17th concession, he would not have bought the limits. There were 300 trees on these lots, which the plaintiff's men would have cut, but they were not allowed, each tree worth \$2.50. Similar evidence was given as to some other lots in Galway, as many as eight or nine. The defendant owned no lots in Snowden.

The agreement declared upon was negotiated with the defendant by the plaintiff's brother, who executed it for him, and who conducted the business of getting out the timber. He swore that he examined number 16 in the 16th concession of Galway, and number 15 in the 17th concession of the same township, which lots the defendant named to him particularly, before he would enter into the agreement, and that it was in consequence of the quality of the timber on these two lots that he entered into it.

For the defence, it was objected: 1. That the instrument put in contained no covenant, and the recital of ownership does not imply a covenant. 2. That there was no evidence of any representations made by the defendant, and if any were made there was no proof that they were fraudulent; that the plaintiff could not recover on both counts. 3. That this action resembles one against a vendor of land for want of title, where the purchaser should protect himself by requiring a covenant, and that an action for deceit would not lie.

The learned Chief Justice overruled the objections, reserving leave to the defendant to move to enter a verdict for him, if the Court should be of opinion that there was not evidence to go to the jury on the second point, or that there was no covenant in the instrument itself to sustain the first count.

The charge was in accordance with the ruling, and the jury found for the plaintiff, damages \$1800.

In Michaelmas term *C. S. Patterson* obtained a rule calling on the plaintiff to shew cause why a verdict should not be entered for the defendant on the leave reserved, or, if either the first or second count should be held not to have been sustained, for a new trial, on the ground that the verdict had been taken generally on the first and second counts; or on account of misdirection, in ruling that there was evidence under the first and second counts; and because the verdict is contrary to law and evidence, and the damages are excessive.

Hector Cameron shewed cause, citing, as to the first count, *Randall v. Lynch*, 12 East 179; *Seddon v. Senate*, 13 East 63; *Barton v. Fitzgerald*, 15 East 530; *Duke of St. Albans v. Ellis*, 16 East 352; *Earl of Shrewsbury v. Gould*, 2 B. & Al. 487; *Webb v. Plummer*, 2 B. & Al. 746; *Severn and Clerk's case*, 1 Leon. 122; *Saunders v. Roe*, 17 C. P. 345; *Proctor v. Johnson*, 1 Buls. 3. As to the second count, *Thomas v. Crooks*, 11 U. C. R. 479; *Hitchcock v. Giddings*, 4 Price 135; *Robinson v. Harman*, 1 Ex. 850; *Hodgins*

v. *Hodgins*, 13 C. P. 146 : *Friel v. Ferguson*, 15 C. P. 598 ; *Mayne on Damages*, 325.

C. S. Patterson, contra, referred to *Add. T.* p. 643: *Sug. V. & P.*, 13th ed., 441.

MORRISON, J., read the judgment of the Chief Justice, who was present during the argument in last term.

The question amounts to this—does this indenture contain a covenant in law that the defendant was owner of the timber in question, or had a right to convey it ?

In *Holles v. Carr*, (3 Swanst. 647), an old but weighty authority on the subject of implied covenants, the Lord Chancellor said : “ Neither the word covenant nor the word agreement is necessary to an action of covenant, but a deed under seal testifying an agreement.” In *Courtney v. Taylor*, (6 M. & G. 851), where the leading cases up to that time were referred to, Sir N. Tindal, C. J., says “ It is enough if the intention of the parties to create a covenant be apparent.” And in the still later case of *Farrell v. Hilditch*, (5 C. B. N. S. 840), which refers to the preceding and other cases, the same doctrine is expressly maintained, and reference is made to *Severn and Clerk's case*, (1 Leon. 122), and to *Barfoot v. Freswell*, (3 Keb. 465) ; and the latter case, notwithstanding the observation of Parke, J., in *Adams v. Gibney*, (6 Bing. 664), is treated as good law.

Again in *Aspdin v. Austin*, (5 Q. B. 671), Lord Denman says : “ Where words of recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instruments had contained express covenants to perform them.”

The words on which the question arises are few : 1st. That the defendant owned and occupied certain timber limits. 2nd. That he had agreed to sell to the plaintiff all the square timber then growing therein that would average seventy-five feet when measured. These two matters are set forth by way of recital, together with the payment of

that consideration for the sale ; and then it is witnessed that the plaintiff has a right to cut, make, and draw off the said timber till a named day.

Conceding that "recital of itself is nothing," and that the first part of this recital would not standing alone amount to a covenant, the part immediately following contains the words "he has agreed," on which words Hales, C. J., in *Barfoot v. Freswell* observes : "Were it but a recital that before the indenture they were agreed, it is a covenant : * * * * for now the indenture itself confirms the agreement and intent precedent, though it be relative to the former act *in pais*, when it is declared by deed it is now a covenant by indenture"; and then if there be, as in *Severn v. Clerk*, a conveyance of the thing specified in the recital, the whole taken together amounts to a covenant.

But then, it must be asked in reference to this deed, a covenant to do what ?

If the words "has agreed," are to be confined exclusively to those words which immediately follow, it may be urged with great force that, admitting that the recital amounts to a covenant to sell certain specified growing timber, that covenant is fulfilled by the witnessing part of the indenture, and the assertion therein that the purchaser "*has*" the right, is no more than an assertion that the vendor had transferred it, and has thus performed his antecedent covenant.

It appears to me, however, that the witnessing part of the deed should not be thus severed from the reciting part, and that the whole should be read together to arrive at the true intent of the parties, and that this intent is plain beyond any question. The defendant's right to the limits on which the timber in question was growing is asserted, a covenant to sell that timber to the plaintiff is entered into, the payment of the full consideration is acknowledged, and this is followed by a declaration that the plaintiff has the right, to be exercised however within a limited time ; and these taken all together appear to me to bring the case within the words of Gawdy, J., in *Severn v. Clerk* : "If I recite by my deed, that I am possessed of such an interest

in certain lands, and assign it over by the same deed, and thereby covenant to perform all agreements in the deed, if I be not possessed of such interest the covenant is broken."

The indenture must be construed so as to ratify and give effect to the preceding agreement. It does not contain present words of conveyance, for its language, on the contrary, asserts that the right contracted to be conveyed has passed, and that the plaintiff has it; and this declaration should I think be incorporated with the previous covenant, making together a covenant on the part of the defendant, that the plaintiff may during the term limited cut, make, and remove the specified timber. As appears to me, this construction is at least as fully warranted by the language used, as to hold that the words "has the right" mean that the defendant thereby transfers it, and I adopt it as more beneficial to the grantee, and as entirely consistent with the self-evident intent of the parties.

I think that in my conclusion I have not violated the "plain and intelligible rule," stated by Kindersley, V. C., in *Iven v. Elwes* (3 Drew. 25, 1 Jur. N. S. 6), that a covenant ought never to be implied *against* the intention of the parties to the instrument, that intention to be collected from the whole instrument, according to the fair, honest, and natural interpretation of a deed.

I think, however, there must be a new trial. The verdict is taken on the first and second counts, and I do not think the evidence sustains the second count, and I may add that I am not able on the evidence to discover by what the jury were guided in the amount of damages. They appear to me to be excessive, upon the facts proved :

See also the following cases : *Duke of St. Albans v. Ellis*, 16 East 352; *Cannock v. Jones*, 3 Ex. 233; *Johnson v. Proctor*, Yelv. 175, Cro. Jac. 233, Cro. El. 809; *Browning v. Wright*, 2 B. & P. 25.

HAGARTY, J.—I concur in thinking that there must be a new trial.

I have not been able to satisfy myself, as the rest of the Court has done, that it is clear that the defendant covenants by this instrument that he was the owner of the timber limits. I quite agree that there need be no form of express covenant to that effect, if on the whole of the deed we can see that it formed part of the contract or agreement between the parties that the defendant was such owner. It seems to me rather to rest in mere recital, and I feel great difficulty in laying down any broad rule of general application, that covenant lies on recital, with nothing more. Should the question arise again, I shall require more consideration before finally acceding to that view.

I also think the case fails on the second count.

But assuming there is a covenant that the defendant was the owner of the timber on certain lots, and that as to some he was not such owner, it is not easy to see on what principle he can be made, in the absence of proved fraud, to pay \$1800 damages for this partial failure of title, having received only \$1000 for the whole. If the analogy of damages in actions on covenants for seizin and right to convey be observed, this verdict must be on a wholly wrong principle.

Perhaps, under all the circumstances, the new trial should be without costs.

MORRISON, J., concurred with the Chief Justice.

New trial without costs. (a)

(a) See also *Isaacson v. Harwood*, L. R. 3 Chancery Appeals 228.

MARY STARK SMITH, v. ROBERT MORTON, JOHN MORTON
AND LEWIS MOFFATT.

Conveyance—Whether fraudulent as against creditors.

V., in 1852, conveyed land to his intended wife upon certain trusts, by which if he survived her the property was to revert to him for life, for his own maintenance and the maintenance and education of the issue of the marriage, if any, and failing such issue, and after his and her death, to go to his right heirs. In October, 1857, in consideration of £50, he conveyed to S., his father-in-law, all his interest in the premises, his wife and two children being then alive, and two children were born afterwards. All these children died before their mother, and she died in 1861. He admitted that in October, 1857, he was apprehensive of difficulty, though he did not consider himself insolvent, and no executions issued for some time after; and in March, 1858, he made an assignment for the benefit of his creditors. He said the £50 was paid to him; and that the object of the deed, as he told S., was to secure any interest he might have in the land for the benefit of his wife and family; and he took a lease from S. subject to rent, which had not been demanded or paid.

S., who died in 1859, devised his interest in this land to his wife for life, and she brought ejectment against a purchaser of V.'s interest under execution, who contended that the deed of 1857 was void as against creditors.

It was left to the Jury to say whether the deed was *bonâ fide* for a good consideration, or a mere fraudulent contrivance to defeat creditors; and they found for the plaintiff.

Held, that the direction was right, and the verdict was upheld.

Wood v. Dixie, 7 Q.B. 892, followed.

EJECTMENT for a rectangular portion of lot number 99 (old survey) on Wellington and Third Streets, in the Town of Chatham, having a frontage on Wellington Street of 104 feet, running north-easterly from the southerly angle of said lot, and fronting on Third Street, fifty-two feet, running in a north-westerly course from the southerly angle of said lot, containing by admeasurement 5,408 square feet. Defence for the whole.

The plaintiff gave notice that she claimed under the last will of Joseph Smith, deceased, as tenant for life, who in his life-time held by deed from Oliver J. VanDolsen.

The defendant Moffatt claimed title as purchaser at Sheriff's sale by a deed from the Sheriff of Kent, under an execution against the lands of Oliver J. VanDolsen.

The other defendants claimed as tenants of the defendant Moffatt.

The trial took place at Chatham, in October, 1867, before Morrison, J.

By an order in Chancery put in, it appeared that this action was brought in the name of the plaintiff, a lunatic, by her committee, who was authorized to bring it by such order.

The plaintiff's case consisted, first, of an indenture, dated 5th October, 1852, made between Oliver VanDolsen, of the first part, and Maria Louisa Smith, of the second part, reciting, among other things, an intended marriage between the parties, and that it had been agreed that Dolsen should settle upon and convey to his intended wife the lands thereafter mentioned, upon the trusts, &c., thereafter declared and expressed; and witnessing that in pursuance of such agreement, and in consideration of the intended marriage, and of the sum of ten pounds in hand paid, he (Dolsen) did grant, bargain, sell, release and confirm to the said Maria Louisa Smith, the premises in question, *Habendum*, to the said Maria Louisa Smith, to the uses and upon the trusts following: First, in the event of the intended marriage, to the use of the said Maria Louisa Smith during her natural life; secondly, in the event of issue of the marriage, then for the joint purpose of the maintenance of the wife and of the support and education of the issue during their minority; thirdly, in the event of Dolsen's surviving the wife, then to revert to Dolsen during the remainder of his natural life, in trust for his own maintenance and that of the issue, if any, as before; fourthly, at the death of the wife and of Dolsen, the land to descend to the right heirs of the body of the wife, being the issue or descendants of the issue of the marriage, "for ever without any limitation;" fifthly, "failing such issue or their descendants," at any time after the death of the wife, whether she survive Dolsen or not, then to descend to the next right heirs of Dolsen in fee; provided, and it is an express condition,

that if Dolsen survive the wife, and such issue and their descendants, then the same shall descend to whomsoever the said Dolsen may by deed or will appoint :—

Secondly, of an indenture, dated 19th October, 1857, made between Oliver J. VanDolsen, of the first part, and Joseph Smith, of the second part, whereby, in consideration of £50, Dolsen granted, bargained, sold, assigned, transferred, set over and quit-claimed all his right, title, interest, claim and demand in and to all right of curtesy, all reversions, remainders, or other estates in possession or expectancy, unto that parcel (the premises) to Smith in fee.—*Habendum*, to Smith in fee, in as full, complete, and ample a manner as Dolsen then or thereafter could do “by reason of his having in him any such estate as aforesaid, or any other soever to said premises.”

Thirdly, of the last will and testament of Joseph Smith, dated 13th August, 1858, whereby he devised to his wife Mary, among other things, the interest which he had in the premises in question for her life, and after her death all his said real and other estate to Oliver J. VanDolsen, upon the trusts and for the sole benefit of Maria Louisa Dolsen, testator's daughter, Dolsen's wife, and to pay her for her use and that of her children the rents and profits, and after her death to hold the same in trust for the use of her children, the offspring of that marriage, till they respectively come of age; and when these trusts become incapable of taking effect by reason of her death, and if any of the children be under age, then when the youngest is of age Dolsen shall continue to receive the rents for their use during his life; and at his death, or in case of his and his wife's deaths before their youngest child becomes of age, he devised the premises to the children of the marriage other than his grandson, Joseph Smith Dolsen, for whom he had already provided. Joseph Smith died on the 18th September, 1859.

On the defence was put in an exemplification of a judgment recovered in the Court of Queen's Bench by James Young and others against Oliver J. VanDolsen, for

\$910 debt, and \$22.31 costs, entered 11th September, 1858, and a *fi. fa.* against lands thereon, which issued on the 19th September, 1860, and a writ of *Ven. Ex.* reciting the *fi. fa.*, issued on the 12th November, 1861, and received by the Sheriff on the same day. Also an exemplification of a judgment recovered in the County Court of the County of Kent, by John J. Bagley, for \$153.77 debt, and \$18.34 costs, entered 2nd February, 1860, and a *fi. fa.* against lands thereon, which issued on the 13th February, 1860, and was renewed for one year from the 12th February, 1861. It was marked as filed by the Sheriff on the 13th February, 1860.

It was agreed on both sides that Oliver J. VanDolsen had a title in fee simple to the premises up to the execution of the marriage settlement, the execution of which was also admitted; also, that Joseph Smith devised the premises to the plaintiff during her natural life, and that the copy of the will produced by defendants might be received in evidence; also, that on the 10th March, 1862, the Sheriff of the County of Kent executed a deed (which was put in) of the same and other lands, in pursuance of some writs of execution against Oliver J. VanDolsen, and that Maria Louisa, the wife of the said Dolsen, and all his children, were dead.

Dolsen was also called as a witness, and proved that in February, 1861, all his children were dead, and that his wife died in March, 1861. He said that he paid for building the brick house on the premises, and lived in it till Joseph Smith died, when he removed to Smith's farm, lived there until January, 1861, and then returned to the premises in question, where he continued till ejected in 1865, under an ejectment brought by Moffatt, one of the defendants.

He said he had a lease of these premises from Joseph Smith, made after he (Dolsen) executed the deed of the 19th October, 1857; that he made this deed to secure a home for the family, as he never thought that property was liable for debts. He said, "I got I think \$200 from

Mr. Smith when I executed the deed. There were many failures in 1857, and I said, as times were getting hard, I thought I might as well secure the property for the family. No doubt I told Smith why I wished he should get a deed of the property. He gave me no paper back. My debts were between \$10,000 and \$12,000."

On the 8th March, 1858, he executed an assignment in favour of his creditors, in which this lot now in dispute was not mentioned. The schedule annexed thereto shewed debts to the amount of \$14,705.31. He admitted the correctness of the following statement made by him on an examination in the cause in Chancery: "The object of the conveyance of this house by me to the late Joseph Smith was for the benefit of my wife and family. There was a marriage settlement of the lot on which this house stands, made by me for the benefit of my intended wife, a daughter of the said Joseph Smith, before my marriage. The lot belonged to my mother, and my father made me a deed of it in 1852. I made the release of what interest I might have had in the said house and lot to Mr. Joseph Smith, for the benefit of my wife and family. I was in trouble at the time, and wanted time to pay all my honest debts, and thought everything would be all right in a few years." When he made the deed to Smith, he had two children alive quite young, and two were born afterwards. He said he did not consider himself insolvent in October, 1857, and did not include these premises in the assets.

The learned Judge told the jury the question for their consideration was, whether the deed from Dolsen to Joseph Smith was a *bonâ fide* transaction, a deed made for a valuable consideration, or whether it was fraudulently made, a mere contrivance for the purpose of delaying or defrauding creditors; and if the latter, to find for defendants.

The defendants' counsel objected that the jury should have been told that if they believed the \$200 was paid to cover the property and protect it from creditors, they should find for defendants, and if they believed Dolsen's evidence on the whole they should find for defendant.

The jury gave a verdict for the plaintiff.

In Michaelmas term, *Douglas* obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a new trial granted, the verdict being contrary to law and evidence and the weight of evidence, which shewed that the deed from Dolsen to Smith was fraudulent and void as against the creditors of the grantor; and for misdirection, in not telling the jury that though Smith might have paid the \$200 to Dolsen, yet that if that payment was made with a view of protecting the property for the grantor and his family against the grantor's creditors, and to delay, hinder, or defeat them, the deed was void.

C. Robinson, Q.C., shewed cause, citing *Wood v. Dixie*, 7 Q.B. 892; *Williams v. McDonald*, 7 U.C. R. 382; *Hall v. Kissock*, 11 U.C. R. 9; *Clark v. Morrell*, 21 U.C. R. 596; *Darvill v. Terry*, 6 H. & N. 807; *Twyne's Case*, 1 Sm. L. C., 6th Ed., 19, 20; *Whitmore v. Lloyd*, 2 F. & F. 36; *Luff v. Horner*, 3 F. & F. 480; Chy. Stats., 3rd. Ed., Vol. II., p. 181.

Becher, Q.C., and *Douglas* supported the rule, and cited *Graham v. Furber*, 14 C. B. 410; *Crawford v. Meldrum*, 3 E. & A. Rep. 101; *Gotwalls v. Mulholland*, 15 C. P. 70, 3 E. & A. Rep. 194; *McMaster v. Clare*, 7 Grant 550; *Bank of Upper Canada v. Thomas*, 9 Grant 335; *Nunn v. Wilsmore*, 8 T. R. 521; *Pennell v. Reynolds*, 5 L. T. Rep. N.S. 286; *Thompson v. Webster*, 7 Jur. N.S. 531; *Harman v. Rickards*, 10 Hare 81.

DRAPER, C. J., delivered the judgment of the Court.

Dolsen being seized in fee, on the 5th October, 1852, executed a deed to Maria Louisa Smith, in consideration of an intended marriage between them, which was soon after solemnized, conveying the premises in question to her upon certain uses and trusts, among others, that if Dolsen survived her the property was to "revert" to him "during the remainder of his natural life, in trust for his own maintenance and support," and in the event of there being issue of the marriage then living, for their maintenance, support and education, and failing such issue, and after the death of Dolsen and the wife, "then to descend to the

next right heirs of Dolsen, and to their heirs and assigns for ever."

On the 19th October, 1857, he executed the deed to Joseph Smith, the validity of which is impeached by the defendants. At that date Dolsen's wife was living, as well as two of their children, and two were born afterwards. All these children died before their mother, and she died in 1861, (March).

In March, 1858, Dolsen made an assignment for the benefit of his creditors. He was evidently doubtful of his own position and apprehensive of failure in October, 1857, and his own statement shews that consideration influenced him when he executed the deed of the 19th of that month, and took back some lease of the premises from Smith.

The only question is, is this deed effectual against his creditors.

The facts principally relied upon for the defence are, Dolsen's insolvent position, his admission that he made this deed to secure a home for his family, though he never thought that property liable for his debts, and that he told Smith why he wished he should have a deed of that property. This admission, it is urged, shews that this conveyance was an express contrivance on his part, in which Smith concurred, to defeat creditors. Further, his holding possession of this property under a lease from Smith, but without ever being called upon to pay rent, was pressed, as further evidence that the transaction was colorable.

On the other side, the nature of Dolsen's interest at the date of this conveyance was brought under our notice. In October, 1857, his wife and two children, issue of the marriage, were living, and the wife lived till March, 1861. The two children who were living in 1857, and two others born afterwards, died before her. But as long as she lived, and there was a possibility of issue, Dolsen could have no other estate in these premises but what he had under the limitations in the deed of 1852, and by virtue of his marriage. He was tenant jointly with his wife in her

right under that deed, and I apprehend that by this conveyance of 1857, his interest and that of his wife became divided into the interest which he had during his life (there being issue of the marriage) which might pass by this deed, and the more remote and contingent interests under the deed of 1852, and the interest which his wife and children had thereunder, which his deed of 1857 could not affect.

We cannot justly interpret his conduct or infer his intentions from the state of things in March, 1861. His expressed intention, in 1857, was for his wife and family, but he really could give neither wife nor child more than the deed gave them, except it were the surrender of his life interest in the event of his surviving his wife. With this intention he sold whatever interest he had, subject to the rights and estates which his wife and children were entitled to, to her father, who was willing to pay and actually did pay \$200, to enable himself to secure to the fullest extent the house and home which the deed of 1852 was intended to give. No one can, I think, properly say there was moral wrong in such a transaction. And Dolsen does not appear to have asked or Smith to have given any undertaking or promise as to what the latter should do. The only thing besides the consideration money was a lease of these premises, subject, as I gather from Dolsen's evidence, to the payment of rent, which would be subject to the executions of his creditors.

The verdict must be taken as an affirmance of an intention on the part of Dolsen to sell the property absolutely, without any secret trust or understanding for his benefit, and that such sale was *bonâ fide* made for a valuable consideration. The argument for the defence has been rested on the ground that this sale was made to prevent any creditor of Dolsen's from taking in execution any and every interest in this property, which he might have under or notwithstanding this deed. I cannot distinguish this case from what is said in *Wood v. Dixie* (7 Q.B. 892), where the Court held that a direction which assumed

the fact of payment and the reality of the transaction, (both of which are established by the verdict here) but still affirmed that if the intent was to defeat the execution creditor the transaction was void, was an erroneous direction. Yet that is what in effect it is contended the learned Judge should have directed here.

We think the rule should be discharged.

HAGARTY, J.—In *Corlett v. Radcliffe*, (14 Moo. P. C. 135) Lord Chelmsford says, “Each case must depend upon its own circumstances, and in all the question is one of fact, whether the transaction was *bonâ fide* or was a contrivance to defraud creditors. It may, however, be stated generally that a deed is void against creditors when the debtor is in a state of insolvency, or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor, or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration; for, as is said in *Twyne’s Case*, ‘a good consideration does not suffice if it be not also *bonâ fide*.’” This was in 1860. ✓

In 1861, in *Darvill v. Terry* (6 H. & N. 807) the Court adhered to *Wood v. Dixie*. Martin, B., says, “I am not aware of any case in which the law so laid down has since been disputed.”

In *Crawford v. Meldrum* (3 E. & A. Rep. 116) cited for defendants, *Wood v. Dixie* is noticed, but not overruled or doubted; but it is distinguished from the case in judgment.

There is no suggestion here that when Dolsen sold his interest in the property the sum of \$200 was inadequate. On the contrary, it may be almost assumed from the evidence that as he was then situated nothing could have been obtained for his interest, had the property been offered for sale publicly.

I do not understand from the evidence that any execution was impending or expected, nor that any suit was

pending, when the conveyance was made. No doubt Dolsen was heavily involved. He says he did not consider himself insolvent in October, 1857.

Now, apart from the provisions of our Insolvent Acts, I think it rather dangerous to the transaction of the common business of life to lay down any rule by which, so long as an execution binding his property is not in force, a man shall be prevented from selling his real or personal estate at a fair price, by proving that executions were impending or expected. We might thus prevent, or at least throw doubt upon, sales made for the express purpose of raising money to pay debts or to discharge an expected execution.

In *Graham v. Furber*, (14 C.B. 414) Sir C. Cresswell left it to the jury to say whether the sale to defendant was *bonâ fide*, for the purpose of relieving the bankrupt from the necessity of a forced sale of his goods under the executions, or for the mere purpose of protecting them from the claims of other creditors, in which latter case it would be a fraudulent and void transaction, and an act of bankruptcy. This direction was upheld by the Court. In that case executions were out, and the goods were sold to the Sheriff's auctioneer at a valuation, and the proceeds applied to pay off the executions, and the vendor's assignees claimed the goods or their value. This case is remarked on in *Clark v. Morrell* (21 U.C. R. 596).

In the case before us we have a man in failing circumstances disposing for full value of a contingent interest in real estate, considering that, as he is selling it to his wife's father, it will probably be for her benefit and that of his children, in whose favor the property had been already settled. No executions apparently issued against him for a long time after the transaction.

I feel most reluctant to throw doubt on the right of a person to sell his estate for full value to any person, a relative or a stranger, so long as no execution is out or even shewn to be impending, when the provisions of the insolvent law do not intervene, and when creditors are not

necessarily or clearly defeated or delayed under the statute.

MORRISON, J., concurred.

Rule discharged, (a).

THOMPSON V. RUTHERFORD.

Insolvent Act—Discharge—Fraud.

To a plea of discharge under the Insolvent Act, confirmed by the Judge, the plaintiff replied a corrupt agreement between the insolvent and D. & Co., parties to the deed of composition and discharge, that in consideration of executing it D. & Co. should receive an additional sum above the composition, for which the insolvent gave them his note; and that the plaintiff and other creditors had no knowledge of such agreement until after the confirmation.

Held, a good answer: the confirmation not being made conclusive by the Act, under such circumstances.

APPEAL from the County Court of Waterloo.

Declaration, on a promissory note made by the defendant, payable to the plaintiff.

Plea. That after the making of the promissory note in the declaration mentioned, the defendant became insolvent within the meaning of "The Insolvent Act of 1864," and after the passing of that Act, and before the commencement of this suit, in pursuance of the said Insolvent Act, a deed of confirmation and discharge was entered into and executed by a majority in number of the creditors of the defendant, for sums of one hundred dollars and upwards, and representing at least three-fourths in value of the creditors of the defendant, which deed was signed by the plaintiff, who then accepted and received from the defendant the sum of \$89.81, being the composition of 8s. 9d. in the pound on his said debt; and the defendant by virtue of the said deed of composition and discharge, and the said Insolvent Act, became discharged from the said promissory note, which

(a) Leave was granted to appeal.

said discharge was duly confirmed according to the provisions of the said Act, by the Judge of the County Court of the County of Wellington, in which said County the defendant at the time of his Insolvency resided and still resides, of which said confirmation the said Judge granted a certificate under his hand as such Judge, bearing date the 4th of July, 1865.

First Replication. That immediately before and at the time of the making and executing of the said deed of composition and discharge by the plaintiff, and the other parties thereto, creditors of the defendant, he, the defendant, besides being indebted to the plaintiff and to numerous other persons, was indebted to certain persons trading in co-partnership under the name and firm of David Torrance and Company, consisting of, to wit, (naming the partners), in a large sum of money, exceeding in amount the sum of \$100, to wit, the sum of \$1843.76; and while the defendant was so indebted as herein in this replication is set forth, it was corruptly agreed upon between the defendant and the said persons so trading together under the name and firm of David Torrance and Company, without the knowledge and in fraud of him, the plaintiff, and divers other persons, creditors of the defendant, who became parties to and executed said deed, that the said persons so trading together under the name and firm of David Torrance and Company should execute said deed, and that the defendant, in consideration of their so doing, should make and give them his promissory note or notes for such an amount in the aggregate as would secure them in, to wit, the sum of 6s. 3d. in the pound, currency, of the defendant's said indebtedness to them in excess of the sum of 8s. 9d. in the pound, currency, of such indebtedness secured by said deed; and afterwards, in pursuance of said corrupt and fraudulent agreement, and in consequence thereof, and the stipulation therein contained on the part of the defendant to be performed, the said persons so trading together under the name and firm of David Torrance and Company did execute the said deed; and the defendant, in pursuance of said agreement, on the

4th February, 1865, made and gave to the said persons so trading together under the name and firm of David Torrance and Company, his said promissory note or notes, payable to them, for the said amount. And the plaintiff further says, that at all times prior to, at the time of, and for a long period subsequently to the execution of said deed by him, and the confirmation granted by the Judge of the County Court of the County of Wellington of the defendant's discharge by said deed effected, he, the plaintiff, and the said other persons, creditors of the defendant and the parties to the said deed, save and except the said parties so trading together under the name and firm of David Torrance and Company, had no knowledge of said agreement entered into between the defendant and said last named persons, and that he, the plaintiff has never at any time ratified or approved thereof. And the plaintiff says that the said discharge and confirmation thereof were obtained by means of the said corrupt and fraudulent agreement hereinbefore set forth, and the carrying out of the provisions thereof. By reason whereof the plaintiff says that the said deed, the discharge thereby effected, and the confirmation of said discharge, were and are null and void.

There was a second replication, setting forth a similar corrupt arrangement with Chapman & Co., other creditors.

These replications were demurred to, and judgment given thereon in favor of the plaintiff. Issue was also taken, and the case was tried.

The replications were fully proved, and that the defendant was resisting payment of the notes so given to Chapman and Company, and that without Torrance and Company there would not be the required majority of creditors executing the deed.

The jury, however, found for the defendant, and after argument a rule was made absolute in the following term for a new trial, on the ground that the verdict was contrary to law and evidence.

Defendant appealed.

McMichael for appellant.

W. N. Miller, contra.

The Statutes referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the Court.

Although there is no appeal on the demurrers, the parties expressed a desire to have the opinion of the Court on the main question, as if the law be with the defendant, a new trial is useless.

The main argument for the defendant is, that the confirmation of the defendant's discharge by the judge made valid the discharge, even if improperly obtained, there being no evidence to shew fraud or preference in obtaining the confirmation, and that by the Statute it was final and conclusive.

The Insolvent Act, (27-28 Vic. ch. 17, sec. 9 sub-sec. 1), provides for the making of a deed of composition and its execution by a majority in number of creditors over \$100, representing at least three-fourths in value of the debts, and this will bind all non-executing creditors.

He may then, (sub-sec. 6), file the deed, and give notice of application for confirmation by the judge, and on the application any creditor may oppose on any ground of fraud or evil practice in procuring the consent of creditors to the discharge or their execution of the deed, besides other objections as to the insolvent's course of dealing. &c.

The Court or Judge may confirm or annul the discharge &c., and his order shall be final, unless appealed from within the time prescribed by the Act : sub-sec. 8.

Until confirmation the burden of proof of complete discharge shall be on the insolvent; "but the confirmation thereof, if not reversed in appeal, shall render the discharge thereby confirmed final and conclusive" : sub-sec. 9.

"Every discharge or composition or confirmation of any discharge or composition, which has been obtained by fraud or fraudulent preference, or by means of the consent of any creditor procured by the payment of such creditor of any valuable consideration for such consent, shall be null and void : " sub-sec. 13.

By the act of 1865, 29 Vic. ch. 18, sec. 28, it is provided that, if any creditor takes any payment, gift, gratuity or preference, as a consideration or inducement to consent to the discharge of the insolvent, or to execute a deed of composition and discharge with him, such creditor shall forfeit and pay treble the value of the payment, gift, &c., so taken, to be recovered by the assignee for the benefit of the estate.

We think the effect of the Statutes is quite plain. The discharge or composition or confirmation, if not appealed against, appears to be final and conclusive as a discharge as to all matters anterior to the matters mentioned in the 13th sub-section above cited; but is avoidable if such discharge, composition or confirmation be obtained by fraud or fraudulent preference, or by means of consent thereto being procured by payment of any valuable consideration for such consent.

If defendant's construction be correct, this sub-section would be apparently useless, and there would be no remedy for the fraud on the other creditors as practised in this case, if it had been, as here, unknown till after the confirmation and the lapse of the proper time for appealing.

It is quite true that the objections now urged to the validity of the discharge might have been urged before the Court below on the application to confirm. There would be some force in this if the corrupt bargain were then known to the plaintiff, although even then we do not say he was absolutely bound to urge them. But here it would appear that this was not discovered until after that time, and the wisdom and justice of the provision in the 13th sub-section are apparent.

There are facilities in abundance to persons desirous of obtaining a discharge from their just debts. It is fortunate that the Legislature have provided some means of preventing these commercial frauds from being perpetrated with total immunity. Both the law and the merits appear to be wholly with the plaintiff, and we think the learned Judge below was right in ordering a new trial.

We cannot help adding that we hope the insolvent was not correct when he stated what one of the witnesses swore to, or that the latter was mistaken in his recollection of the conversation: namely, "that his solicitor advised him to give the notes to the parties, that they could not be recovered."

We dismiss the appeal with costs.

Appeal dismissed.

NOBLE V. SPENCER ET AL.

Written contract—Parol evidence.

The plaintiff sued defendants upon a contract by them to purchase from him four thousand barrels of crude petroleum, claiming damages for the loss of a large quantity destroyed by an accidental fire, and which he alleged should have been previously taken by them under the agreement, which bound them to take it as fast as their barrels could be received, emptied and returned. The defendants refused to accept, on the ground that the oil was not of the quality contracted for.

Held, that evidence was inadmissible that, in conversation shortly before the written agreement, the defendant spoke of receiving six or seven car loads per week; and such evidence having been received, a new trial was granted without costs.

THIS was an action against the defendants upon a contract in writing, dated 18th May, 1867, whereby the defendants agreed to buy four thousand barrels of crude petroleum, of the gravity of 34° warranted, and agreed to take or to commence to take it as soon as a prior contract of one thousand barrels purchased by the defendant Spencer from the plaintiff was completed, and to take it as fast as their barrels could be received, emptied and returned, and to pay for it (at the rate of \$1.25 per barrel) as fast as delivered, free on board the cars at Petrolia.

The declaration averred that the plaintiff delivered and the defendants accepted 827 barrels; that the plaintiff was ready to deliver the residue, but the defendants would not accept and return their barrels to be refilled, and afterwards

refused to receive any more, or to pay for the portion delivered, or for the residue. And the plaintiff claimed damages for keeping, storing and tanking the oil, and for the loss of 3173 barrels, which, together with the tanks containing that quantity of oil, were destroyed by an accidental fire. The declaration also contained the common counts.

The defence was that the oil furnished by the plaintiff was only of the gravity of 31° , and that the plaintiff would not supply oil of the gravity of 34° . The defendants also paid \$225 into Court, in addition to \$700, for which they put in the plaintiff's receipt dated 23rd May, 1867.

At the trial, at Sarnia, before Morrison J., the plaintiff gave evidence that in conversation very shortly before the written agreement was signed, the defendants spoke of receiving six or seven car loads per week, each car taking fifty-eight barrels. The evidence was received, after objection by the defendants' counsel, that it was adding a term to the contract. When this objection was renewed last term, the plaintiff's counsel answered that the evidence was offered only to anticipate the question whether when the fire occurred (3rd or 4th August, 1867), a reasonable time for the defendants to have emptied and returned their barrels had elapsed, for it was urged that if it had the defendants were responsible for the value of the oil destroyed, which was ready to be put into the barrels, if they had been returned to be refilled by the plaintiff according to this understanding.

There was very contradictory evidence as to the oil being of the gravity required by the contract. and this was the matter chiefly in dispute between the parties. The learned Judge left it to the jury to say whether the plaintiff had, as to the oil delivered, fulfilled, and as to the residue was ready to fulfil, his contract, having especial reference to the quality of the oil. If they found this, and that the contract was broken by the defendants, he directed that the measure of damages was the difference between the contract price and the market price at the time the contract was broken by the defendants.

The jury found for the plaintiff—damages, \$2109.

Harrison, Q. C., *Ferguson* with him, obtained a rule *nisi* for a new trial, for the improper reception of evidence on behalf of the plaintiff, in this, that the learned Judge who tried the cause admitted evidence of a verbal understanding or statement by the defendants to accept, or that they would accept, a certain number of barrels of oil per week, which was prior to the written contract afterwards entered into between the parties, upon which this action was brought, and which written contract contains no such undertaking or stipulation; or on the ground that the verdict is contrary to law and evidence, and the weight of evidence, and the Judge's charge; and that the damages are excessive.

They cited *Tay. Ev.*, 4th ed., sec. 1058; *Rosc. N. P.* 24-6; *Powell v. Edmunds*, 12 East 6; *Greaves v. Ashlin*, 3 Camp. 426; *Shelton v. Livius*, 2 C. & K. 411; *Moseley v. Hanford*, 10 B. & C. 729; *Flinn v. Calow*, 1 M. & G. 589; *Ford v. Yates*, 2 M. & G. 549; *Lockett v. Nicklin*, 2 Ex. 93; *Sotilichos v. Kemp*, 3 Ex. 105; *Harnor v. Groves*, 15 C. B. 667; *Shore v. Wilson*, 9 C. & F. 567, per *Tindal C. J.*; *Baron de Rutzen v. Farr*, 4 A. & E. 53; *McBride v. Bailey*, 6 C. P. 9, 12, 13; *Crease v. Barrett*, 1 C. M. & R. 919.

M. C. Cameron, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the Court.

The only objection taken to the learned Judge's ruling in support of the motion for a new trial, is the admission of the evidence of the conversation above stated. The application was also rested on the ground that the verdict was contrary to law, evidence, and the Judge's charge, and also that the damages were excessive.

The case of *Greaves v. Ashlin*, (3 Camp. 426), seems to us opposed to the admissibility of this evidence. In that case there was a written contract for the sale of fifty quarters of oats, which the defendant had not delivered, and to excuse the non-delivery he offered to prove that it was part

of the plaintiff's agreement to take away the oats immediately, though in the contract no time for the delivery was named. Lord Ellenborough held that it was not competent for the defendant to give such evidence, as it materially varied the contract. The plaintiff here has given evidence that the defendants agreed to take six or seven car loads of fifty-eight barrels each weekly, until he had taken all. Surely this is as much a material variance as in the case cited. This conversation could not have been evidence to prove a breach of the written contract, for the simple reason that the written contract contains no such stipulation; nor did it furnish evidence upon which a calculation of damages could be based, for the defendants had entirely repudiated all liability on the contract, on the ground that the plaintiff had failed in the fulfilment of a condition which preceded any possible liability on their part, namely by the non-delivery of oil of the quality contracted for. Their refusal to accept constituted a complete breach of the contract on their part, especially evinced as it was by their not returning their barrels to be refilled, coupled with their letter of the 3rd July, 1867; and if that refusal could not be justified, the plaintiff acquired a complete right to recover damages *to instante* that it was made. We think therefore, this evidence should not have been received, and it may have had an influence on the minds of the jury.

I am not prepared to say that upon any of the other grounds I should have made the rule absolute, unless my brother Morrison had declared himself dissatisfied with the finding or damages, although the evidence on the defence rather leads me to the conclusion that the oil was not of the quality contracted for, and in my opinion the weight of evidence was in the defendants' favor. The jury have evidently arrived at a contrary conclusion. The great fall in price which took place in the price of oil may have suggested itself to the jury as a leading cause for the defendants' abandoning the contract, while the destruction of the oil, which but for the difference between the parties as to its quality would probably have all been delivered,

may have biassed their minds, and induced them to act upon the evidence admitted of the defendants undertaking to take it away at a rate which would have saved it from the fire.

However this may be, we think there should be a new trial without costs.

HAGARTY, J.—Any verbal conversation prior to the written contract is excluded, but if as they are signing the agreement one party says to the other: "Now, remember, you are to do so and so," it is for the jury to say whether it was understood that that should be made an independent verbal agreement. This seems to be the result of *Lindley v. Lacey*, (17 C. B. N. S. 578), and the later cases (*a*).

MORRISON, J., concurred.

Rule absolute.

THE GREAT WESTERN RAILWAY COMPANY v. ROGERS.

R. W. Co.—Assessment—Avowry.

In avowing for a distress for taxes due upon land belonging to a Railway Company, it is unnecessary to allege that in the assessment the value of the land occupied by the Railway was distinguished from that of their other real property, or that they had no other real property, or that the assessment was communicated to the Company. Such objections should form the subject of a plea.

REPLEVIN for a Railway Passenger Car.

Avowry. That before the taking in the declaration mentioned, the Erie and Niagara Railway Company were the owners of certain lands within the Municipality of the Town of Niagara, which had been duly assessed, with all the rateable property of said town, by the assessors of the said town for the year 1867, and there were due and owing upon the said lands by the said Erie and Niagara

(*a*) See *Malpas v. The London and South-Western R. W. Co.*, L. R. 1 C. P. 336.

Railway Company, for the said year, certain rates and taxes, amounting to a large sum of money, to wit, \$400, which had been in due form of law ordered and directed to be levied and raised by the said town upon such assessment of all the said rateable property of said town. And the clerk of the said town duly made out the collector's roll of the said town, and in the said roll the said Erie and Niagara Railway Company were set down as chargeable with the said sum of money as rates and taxes for the said year, for the said lands in the said town; and the said roll being so made, the said clerk delivered the same to the defendant, then and still being the collector of the said town, to collect the said rates and taxes in the said roll mentioned; and thereupon the defendant duly demanded the payment of the said sum of money for the said rates and taxes from the said Erie and Niagara Railway Company; and ten days having elapsed after such demand was so made by the defendant, and the said Erie and Niagara Railway Company not having paid the same, the defendant took and distrained the said passenger car in the declaration mentioned, then being on the said lands, and in the possession of the said Erie and Niagara Railway Company in the said town, as and for the said rates and taxes, as he lawfully might for the cause aforesaid.

Demurrer.—Because the allegation that the Erie and Niagara Railway Company has been duly assessed by the assessors is insufficient, as it does not appear that the value of the land occupied by the Railroad was distinguished from the value of the other real property of the said Railway Company, nor that there was no other real property of the said Railway Company within the said municipality; and that it is not alleged that the assessor communicated to the said Company such assessment, in pursuance of the Statute in that behalf; and further, that there is no allegation that the said collector demanded payment of the rates and taxes of the plaintiffs before the distress made by the defendant as collector.

Irving, Q.C., for the demurrer, cited 29-30 Vic., ch. 53, sec. 33; *Taylor v. Jermyñ*, 25 U. C. R. 86; *Municipality of London v. Great Western Railway Company*, 16 U.C. R. 500; *Haacke v. Marr*, 8 C.P. 441.

J. H. Cameron, Q.C., contra.

HAGARTY, J., delivered the judgment of the Court.

Mr. Irving strongly urged that the avowry must be good "*in omnibus*," and shew a complete title sufficient to warrant a return of the goods. He relied mainly on *Haacke v. Marr*, (8 C.P. 441.)

There a party avowing for distress under a school rate, under a by-law required to be passed on request or consent of certain persons, must shew the request or consent. "If," says the C. J., "the authority of the Municipal Council to pass this by-law was to be exercised directly and immediately under the statutes of the Province, without any condition precedent necessarily interposing before the authority could be lawfully exercised, then the by-law passed immediately under such authority, and within its scope, would by itself protect and justify these officers, whose duty it was to carry it into effect. In such a case it would not, I think, be necessary even in an avowry to set out more than the by-law, and to shew that the act complained of was authorised or commanded by it."

Now in this case the authority to levy the rate is derived directly and immediately under the Statutes, and no condition precedent existed as in the case cited.

In *Gillies v. Wood* (13 U. C. R. 360) the cognizance averred that the plaintiff, a freeholder in a school section, was liable to be assessed to pay school rates, and as such freeholder, and by force of the statute, was duly assessed to pay so much, &c.

On demurrer it was said by Draper, J., that he did not think it necessary to shew that a meeting was held at which it was resolved to raise the money; the annual school meeting would be presumed to have been held.

The trustees or the council had power to impose a rate; "and it seems to me at present, that it cannot be necessary for the collector, who makes cognizance under the warrant, to set out the performance of all these acts; but that he may aver, as is done, that the plaintiff was duly assessed and rated, leaving him to reply the commission or omission of anything which would destroy that conclusion. The defendant is an officer justifying under a warrant which the trustees had *primâ facie* legal authority to issue. Enough is stated in the plea to disclose that."

We think the avowry here is free from the objections which prevailed in *Haacke v. Marr*, for the reasons pointed out in that case. We think the objections urged by Mr. Irving should be the subject of a plea in answer to the avowry, which appears to us to be clearly sufficient on its face.

Judgment for defendant.

CAIN V. THE LANCASHIRE INSURANCE COMPANY.

Insurance—Termination by insurers.

A fire policy provided that, if for any cause they should so elect, it should be optional with the Company to terminate the insurance after notice given to the insured of their intention to do so, in which case they should refund a rateable proportion of the premium. Defendant, in a plea under this condition, alleged that before the fire they elected to terminate the insurance, and gave notice to the plaintiff of their intention to do so, and did *thereby* terminate the said insurance; and, after the said termination, and before the loss, tendered to the plaintiff a rateable proportion of the premium, which he refused to accept. It was objected, on demurrer, that the condition required a termination *after* election and notice, but *Held*, that the plea was good.

DECLARATION upon a policy of insurance against fire.

Plea. That amongst the conditions indorsed on the said policy was a condition in the words following, that is to say: "If during this insurance the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if for any other cause the

Company shall so elect, it shall be optional with the Company to terminate the insurance, after notice given to the insured or his representatives of their intention to do so, in which case the company shall refund a rateable proportion of the premium." And that during the said insurance, and before the happening of the said fire, the defendants were informed that the said hotel had been set on fire; and the defendants had reason to suspect that the said insured building would be unlawfully and maliciously set on fire; wherefore the defendants elected to terminate the said insurance, and before the happening of the said loss gave notice to the plaintiff of their intention to do so, and did thereby terminate the said insurance; and the defendants were always, at and after the giving of the said notice, ready and willing to refund to the plaintiff a rateable proportion of the said premium, whereof the plaintiff had notice; and the defendants after the giving of the said notice, and the said termination of the said insurance, and before the happening of the said loss, tendered and offered to refund to the plaintiff the said rateable proportion of the said premium, but the plaintiff refused to accept the same.

Demurrer, on the grounds :—

1. That the said plea does not aver that prior to the time of offering to refund the said proportion of the premium, that they, the defendants had terminated the said insurance.

2. That the said plea does not allege that the defendants had prior to the time of the happening of the said fire, or at any time, terminated the said insurance.

3. That the defendants do not allege or shew in their said plea any termination of the contract, in accordance with the condition set out.

4. That the only termination pleaded is one of inference or argument, as consequent on the giving notice, whereas the condition requires a termination as a matter of fact, and after election and notice.

5. That for all that appears in the said plea the contract is a yet subsisting one.

6. That the giving of the notice of their intention to terminate, was not in law or fact a termination, as the plea implies.

Becher, Q. C., for the demurrer.

C. S. Patterson, contra.

HAGARTY, J., delivered the judgment of the Court.

The condition is awkwardly expressed,—that it would be optional with the underwriters to terminate after notice given, in which case they should refund. There is no doubt that the giving of notice would be an essential ingredient in terminating the insurance.

Here the defendants aver that they did elect to terminate, and gave notice of their intention so to do to the plaintiff, and did thereby terminate the risk, and after giving the notice and the termination of the insurance offered to refund.

Now the only ground of objection would seem to be the introduction of the word “thereby”; without it, the averment would be that they did terminate the risk.

No particular way is provided in which the termination is to be effected or declared; all that is required is to say they elected to terminate, gave the notice, and did so terminate the contract.

We do not see why we should hold that they have not averred a termination because they choose to aver that they did it “thereby,” or in the manner set out, by making their election and giving notice thereof. So long as we find an averment that they did terminate the risk, having given the notice, we think the word “thereby” cannot destroy its effect.

Besides, this is at once followed by an averment of a tender back of the premium, “after the giving of the said notice and the said termination of the said insurance.”

This tender could only be made consistently with a previous notice and termination.

We think that it would be giving way to a special

demurrer not to hold that the defendants have here shewn in words reasonably clear the condition and their action under it, so as to determine the contract.

The plaintiff could have readily replied to this any matter of fact, by which he could escape the effect of the condition.

Judgment for defendants.

REDMOND v. REDMOND.

Work and labour—Relationship—Evidence of hiring.

The plaintiff sued her brother for wages during several years that she had lived with him on his farm, keeping house for him while he was unmarried.

Held, that from this alone the law would not, under the circumstances, imply a promise to pay; and there being no other evidence of any hiring or promise, that there was nothing to go to the jury.

ACTION for work and labour.

Pleas.—Never indebted, &c.

The plaintiff's particulars claimed eleven years work, from May, 1856, to May, 1867, at \$80 a year.

The case was tried before Morrison, J., at the last London Assizes, when the plaintiff called four witnesses. Charlotte Shepherd stated she knew the plaintiff and defendant for eleven years, but for the last four years she did not visit them; that the plaintiff performed the household work of defendant's house, milking cows, feeding pigs, marketing, selling butter, &c.: that she clothed herself by monies received by her under her father's will: that eleven years ago the plaintiff was quite a young girl: that defendant was plaintiff's brother, and he and she lived together until about the time the plaintiff got married: that she had money of her own; that she was the mistress of her brother's (the defendant's) house, inviting persons there to tea, &c.

Jane Sparksman testified that for the last ten or eleven

years the plaintiff was the only person doing work at defendant's house; she kept it until after defendant was married: that shortly before the plaintiff left her brother, he said to witness he would turn plaintiff out, as he did not like one Black coming there. This Mr. Black was a person with whom the plaintiff afterwards intermarried. She also stated she was not aware there was any servant in the house with the plaintiff: that she visited defendant's house on the invitation of the plaintiff, who was mistress in defendant's house.

David Phoenix.—This witness worked for defendant two years, and he stated that the plaintiff did all the house work, &c., that defendant on one occasion said the plaintiff was a smart house-keeper, and witness thought from the way she worked she was on wages, and he further stated that she was mistress of the house. The evidence of the last witness called was immaterial.

Upon this evidence the plaintiff's counsel rested the case.

J. H. Cameron, Q. C., for defendant, submitted that the plaintiff should be nonsuited; that there was no evidence of any hiring or contract. *Cornish*, for the plaintiff, contended that the law presumed a hiring, and that it was a question for the jury, and that it was for the defendant to shew that the services were gratuitous.

The learned Judge stated that his leaning was against the plaintiff: that in his opinion the evidence did not prove any contract, nor did it raise an implied promise to pay for services: that it was incumbent on the plaintiff to shew that the services were performed under circumstances to justify an expectation on the part of the defendant and the plaintiff that pecuniary compensation would be required; that the proof was not thrown on defendant to shew that his sister performed the service gratuitously; and that in his opinion the plaintiff should be nonsuited.

Upon this intimation the defendant's counsel, in deference to the learned Judge's opinion, took a nonsuit.

During last Michaelmas term, *Harrison*, Q.C., obtained a rule to set aside the nonsuit, for misdirection in the learned Judge, in ruling that there was no evidence to submit to the jury in support of the plaintiff's claim.

During this term, *M. C. Cameron*, Q.C., shewed cause, citing *Sprague v. Nickerson*, 1 U.C. R. 284.

Harrison, Q.C., supported the rule. He cited *Rex v. Inhabitants of Chillesford*, 4 B. & C. 94; *Wismer v. Wismer*, 23 U.C. R. 519; *Rosc. N. P.*, 11th Ed., 278.

HAGARTY, J.—We do not base the opinion we have formed on any implication of law arising from the mere relationship of the parties.

—When goods are supplied to a man or work done for him, the law implies a promise on his part to pay, but in the latter case the statement of the fact furnishes the answer. Is there proof of work done, in the popular sense of the words? A labourer working for a farmer—a smith shoeing his horses—a carpenter shingling his house—all these in their very nature imply the relation of employer and employed. So it is laid down in *Addison on Contracts*, 5th Ed., p. 21. "The law implies a promise from the employer, in case nothing has been said or stipulated concerning payment, to pay a reasonable compensation for the services rendered."

—The difficulty seems to lie in applying a plain rule to such a state of facts as this case discloses.

It is shewn that the defendant and plaintiff, sister and brother, were living together in the same house, the brother working on the land, the sister doing the house work and attending to milking cows, feeding pigs, &c. She invited people to the house when she pleased, and appeared the mistress of the house, and this continued for a great number of years, commencing when the plaintiff was quite a young girl; and during all that time no proof was offered of a word being said by either to the other of hiring or service, or payment of wages.

The only importance of the fact of relationship was,

that it made the fact of their living together, especially during the years that defendant was unmarried, a most natural arrangement, and flowing most probably therefrom.

Now in such a state of facts there was most certainly no evidence of any actual hiring or promise to pay. Does the law necessarily imply both a hiring and promise to pay therefrom? We are not prepared to hold that it does.

We are told by the plaintiff's counsel that it should have been submitted to the jury to decide. That seems to beg the whole question. No case should be left to the jury unless there be some legal evidence; and unless the Judge was prepared to tell them that the law would imply a contract to pay on such a state of facts, what evidence was there to be submitted? The plaintiff could only recover as for a breach of contract express or implied.

The language of Sir John Robinson, in *Sprague v. Nickerson*, (1 U.C. R. 284) is applicable to the case of a daughter and father, but may be not without point here: "An unmarried female, living for years in the house of her father, because he is old and infirm, brings after his death an action for several years wages, not shewing that any specific contract of hiring had taken place, but founding her claim on some loose expressions, heard in casual conversation, that he meant to make her compensation. * * This young woman could not be living anywhere else more properly than with her aged and infirm parent, and if she did acts of service instead of living idly, it is no more than she ought to have done in return for her clothes and board, to say nothing of the claims of natural affection." &c.

In the case before us there was not even the evidence of loose expressions of making compensation by defendant, and, pursuing its line of thought, it may be said that nothing was more natural that an unmarried young woman should live with and keep house for her brother, especially while he was also unmarried, and that without the idea of hiring or wages entering into the mind of either.

It would be we fear a mischievous doctrine to lay down,

that in every case in which a niece, or cousin, or sister in law is proved to be living in a farmer's house, treated in every way as one of the family, and assisting in the work of doing all or most of the house-work, she could, in the absence of any evidence whatever as to hiring or wages, be held entitled to the direction of a judge that the law in such a case implied a promise to pay.

If the judge cannot give such direction, what is the legal evidence to be submitted to the jury ?

I have always held a very strong opinion that the whole burden is thrown upon a plaintiff seeking damages, to prove with reasonable clearness the right to take money from defendant; and where he only makes out a case of mere probability, it should not be thrown to the jury to speculate on what the truth may be as to contract or no contract between the parties.

In *Avery v. Bowden* (6 E. & B. 974) Cresswell, J. says, "Lord Tenterden said that, if the evidence was such that the jury could conjecture only but not judge, it ought not to go to the jury: that the onus was on the party offering the evidence; and that he, if he offered only evidence consistent with either supposition of fact, was not entitled to have it put to the jury. * * If the evidence lead only to conjecture, it is not fit for the consideration of the jury."

In *McMahon v. Lennard* (6 H. L. Cas. 993) Mr. Justice Wightman, delivering the opinion of the Judges, says, "It may be fit to consider what is to be understood by the expressions 'any' evidence or 'no' evidence to go to the jury. The reasonable rule appears to be that expressed by the Exchequer Chamber in *Avery v. Bowden*, in accordance with the opinion of Lord Tenterden," citing the words already given.

The evidence in the present case could at best only raise a conjecture. We are strongly of opinion that to reasonable minds even such conjecture would be of the absence of any contract express or implied.

In this view we think the evidence was insufficient to submit to a jury.

Rule discharged.

FAWCETT V. THE LIVERPOOL LONDON AND GLOBE
INSURANCE COMPANY.

Insurance—Proof of loss—What may be required—Condition—Construction of.

The plaintiff sued on a policy which required the insured, in the event of loss, to deliver as particular and accurate an account thereof as the case would admit, and produce such other evidence as the directors, &c., should reasonably require. The house insured was burned on the 21st August, 1867. On the 5th October the plaintiff sued, and on the 9th he furnished a builder's certificate of the value of the building, which had been required by the defendants before the action.

Held, that such certificate was reasonable evidence to require; that being demanded before action, the plaintiff could not sue without giving it; and that, in the absence of any special circumstances, the question whether it had been required within a reasonable time did not arise.

Whether the condition authorised the demand of such certificate was a question for the Court, though whether what was furnished complied with the requisition might be for the jury.

The demand was made by the defendants' inspector, whose duty was to visit the agencies and adjust losses. It was objected that only the directors could make it; but, *Held*, sufficient, they having adopted the Inspector's Act.

THIS action was brought on a policy of insurance against fire, made by the defendants, dated 11th March, 1867, on a house occupied by the plaintiff as a tavern, situate on lot 1, in the 8th concession of Moore, for \$2000, and on a barn eighty feet from the house, \$400; subject, among other things, to a condition that persons insured by the defendants, sustaining any loss or damage by fire, should forthwith give notice thereof, &c., specifying where the notice should be given, and should within fifteen days after the fire deliver to, &c., as particular and accurate an account of their loss or damage, supported by vouchers, as the case would admit, and verify the same by declaration or affirmation before a Justice of the Peace, and produce such other evidence as the directors, &c., should reasonably require; and if there appear to be any fraud, overcharge, or imposition, or any false swearing, or if the fire should have happened by the procurement or wilful act, means or connivance of the insured or claimants, he, she, or they should be excluded from all benefit under the policy. Averment, that before the 11th March, 1868, the plaintiff assigned the premises to Thomas Barwise,

and the policy was, with the consent of defendants, assigned to him, and the defendants accepted such assignment : that before the 11th March, 1868, the house was destroyed by fire, which did not happen by reason of any of the excepted perils or contingencies, whereby Thomas Barwise suffered loss to the amount of \$2000, and this action is brought for his benefit. And all conditions were fulfilled, &c., &c., and nothing happened or was done to prevent recovery.

Pleas—1. That the defendants, before the commencement of the suit, reasonably required from Barwise that he should produce to the defendants a certificate from a builder of the value of the building in the declaration mentioned and destroyed by fire, and the cost of the same, and that Barwise did not produce such declaration.

2. That the policy was obtained by the fraud and misrepresentation of the plaintiff in the application for insurance, in representing that the cash value of the house, for the loss of which this action is brought, was the sum of \$3000, whereas the cash value was much less.

The case was tried at Sarnia, on the 29th October, 1867, before Morrison, J.

The defendants began. Their inspector, F. A. Ball, proved that in a conversation with Barwise, on the 4th October, 1867, he told Barwise that the defendants required a builder's certificate of the value at the time of the fire of the property destroyed. He produced the proofs which had been received, namely, the affidavit of Barwise, stating the fire to have taken place on the 21st August, 1867 ; that the house was destroyed, and that the true and actual cash value thereof at the fire was \$2000 ; that the fire was generally supposed to be the work of an incendiary, the fire having commenced on the outside. This affidavit was sworn on the 28th August. There was a regular certificate of a Justice of the Peace, dated 29th August, and he thought he had received these within fifteen days after the fire. He said he did not require any further proof then, as he expected to visit the place and make enquiry as to the extent of the loss. He said he could not say he was autho-

rized to pay losses. He did not forward the proofs to the head office, (in Montreal), because the defendants were sued before he had an opportunity of enquiring into the loss: that he was served with the writ in this cause on the 5th October. He said that ten days before that he was served with a first writ: that before he saw Barwise, and after the receipt of these proofs, and before he communicated with the head office, he received the first writ, and ten days after was served with the second. A few days after speaking to Barwise, on the 4th October, a builder's certificate was forwarded to him. The plaintiff's attorneys on the 9th October wrote to Mr. Young, the defendants' agent at Sarnia, and enclosed a valuation, which they stated they had been informed was requested by him. It was as follows: "Moore, October 8, 1867, Thomas Barwise, Esq. Sir,—According to request I have examined and calculated on the size and the cost of Mr. Fawcett's tavern, lately burned down in Moore, and came to the conclusion that the building at a low estimation could not have cost less than \$2100, nor more than \$2500." Signed, "Alexander Watson." Mr. Young replied that the builder's certificate of value was not deemed satisfactory, inasmuch as it did not estimate the actual value of the building at the time of the fire, and he requested another.

The learned Judge on this evidence nonsuited the plaintiff, reserving leave to him to move to enter a verdict for \$2000, with interest.

In Michaelmas term, *Harrison*, Q. C., obtained a rule accordingly. He argued that there was no notice of the requirement of a builder's certificate by the directors of the defendants' company at Montreal, or elsewhere: that the builder's certificate was not reasonably required, in this, that the requirement was not made in a reasonable time, and whether made in reasonable time or not was not a reasonable requirement: that the reasonableness of the requirement, either as to time or subject, was a question for the jury, and not for the Judge, or was at all events a mixed

question of law and fact. He cited *Tay. Ev.*, 2nd ed., p. 37; *Stewart v. Cauty*, 7 M. & W. 160; *Pitt v. Shew*, 4 B. & Al. 206; *Lynch v. Bickle*, 17 C. P. 549.

Galt, Q. C., shewed cause, citing *CinquMars v. The Equitable Insurance Company*, 15 U. C. R. 246.

DRAPER, C. J., delivered the judgment of the Court.

It seems by the statement of the learned counsel for the plaintiff that the first writ spoken of by the witness Ball was defective, and by the second this action was commenced by a writ issued on the 5th October, 1867. According to the tenth condition indorsed on the policy, notice of the loss had to be given in this case, either at the office in Montreal, or to the agent through whom the policy was effected. From the wording of the condition, I think it was to the latter. No question on this point is raised; the defence is rested on these words: "and shall produce such other evidence as the directors may reasonably require." The 11th condition gave the defendants the right with all convenient speed to rebuild houses destroyed by fire, instead of paying the sum insured.

The certificate of a builder of the value of the house at the time of the fire was, as is insisted for the defendants, evidence as to the extent of the loss which they might reasonably require, for, if of no other value, it was an important element to enable them to decide whether they would avail themselves of the option afforded them by the 11th condition.

The plaintiff in effect has conceded that it was a reasonable request, by furnishing the certificate of Watson. Whether it is so or not is however a matter arising on the contract, the exposition of which is the duty of the Court. The insured claiming indemnity for loss by fire, are under the necessity of delivering as particular an account of such loss as the nature and circumstances of the case will admit (supported by vouchers), and must verify the same by solemn declaration or affirmation, and must produce such further evidence as the directors may reasonably require.

Whether the evidence demanded is within the scope of the condition does not appear to us, strictly speaking, a question for the jury; whether what is furnished is sufficient as a compliance with the requisition may be; but that is not the question now, for the objection is that it should have been left to the jury to say whether the directors had a right to require such evidence; and in this we do not agree. But if it were a proper question for them, and should have been submitted, we have a very strong opinion that the evidence required was so plainly as a matter of fact reasonable, that as at present advised we should think a verdict affirming the contrary could not be upheld.

As to the question of reasonable time, we do not think it arises on the facts of this case. If the evidence called for was of a nature which the defendants had a legal right to demand, the compliance with it was a condition precedent to the plaintiff's right to sue. He was not bound to delay his suit to enable the defendants to require such evidence, but when required before he had commenced his action, he must comply. We do not mean to say there are no possible circumstances under which a demand for such evidence would not come too late, or the right to make it may not have been waived; but no special circumstances are shewn here, and consequently there was nothing to submit to the jury with respect to it.

It was however further objected, indeed it was the first branch of the rule, that the directors alone had the power of making the demand. It appears to have been made by their inspector as an act within the scope of his duties, which he swore were to visit the agencies and adjust losses. The defendants, through their directors, who must have authorized the defence, have adopted the act, one which must have been done through some officer in the defendants' service under the order of the directors.

Assuming that the evidence required was such as under the condition might be properly demanded, we think that bringing this action without having furnished the certifi-

cate was a breach of a condition precedent, and that the nonsuit was therefore unquestionably right. See *Toms v. Wilson* (4 B. & S. 442, 456.)

We think the rule should be discharged.

Rule discharged.

MORGAN V. LUKE SABOURIN AND JOSEPH SABOURIN..

Conveyance by married woman in 1821—Certificate of examination.

A conveyance of land in the Eastern District by a married woman, executed on the 8th October, 1821, had endorsed upon it this certificate: "Personally appeared this day, in open session, the within named E. B., wife of J. B., who being duly examined touching her consent to alien and depart with her lands within mentioned, declared that she freely and voluntarily," &c. "Given under my hand in open Court, this 10th October, 1821, (Signed), Joseph Anderson, Chairman." It was proved that Joseph Anderson was Chairman of the Sessions, being usually chosen so, though not the Judge of the District Court. The defendant objected that the certificate did not state that she appeared and was examined in open Court, nor that it appeared to the Court that she freely, &c., nor that the Court was held in and for the Eastern District; nor did it appear that she was then over the age of twenty-one; but *Held*, (the execution of the deed being proved by its age,) having regard to the intention of the Legislature to do away with the effect of informalities (C. S. U. C. ch. 85, sec. 13), that the certificate, with the evidence, was sufficient.

EJECTMENT, for the west half of lot number 18, in the 10th concession of the township of Finch. Writ issued 24th August, 1867. Defence for the whole.

The plaintiff's notice of title was by deed from Gilbert Morgan, dated 24th August, 1867. The defendants' notice was as tenants at will to George S. Jarvis, Esquire.

The issue was tried at Cornwall, in October, 1867, before Hagarty, J., and the Jury rendered a verdict for the plaintiff. The following was the evidence:—

By letters patent under the great seal of Upper Canada, dated 2nd April, 1807, lot 18 and the western part of 19, in the 10th concession of Finch, were granted to Elizabeth Boice, wife of John Boice, of the township of Matilda, in the Eastern District.

By indenture, dated 8th October, 1821, John Boice and Elizabeth Boice, described as of Matilda, County of Dundas, Eastern District, in consideration of £200, granted, &c., to Peter Zearon, the same lots in fee. This deed appeared to have been executed by both the grantors, and on it was indorsed as follows :

“ Personally appeared, this day, in open session, the within named Elizabeth Boice, wife of John Boice, who being duly examined touching her consent to alien and depart with her lands within mentioned, declared that she freely and voluntarily conveyed and relinquished the same, without coercion or fear of coercion from her said husband, or any other person or persons whatever. Given under my hand in open Court, this tenth day of October, in the year of our Lord one thousand eight hundred and twenty one.” (Signed) “ Josh. Anderson, Chairman.” By the certificate endorsed on this deed, it appeared to have been registered on the 15th November, 1821.

The chain of title was deduced to the plaintiff from Peter Zearon, the grantee in this deed.

Evidence was given that Joseph Anderson (now deceased), was the Chairman of the Quarter Sessions of the Eastern District, and his signature to the certificate was proved. He was not Judge of the District Court, but was generally chosen by the Justices of the Peace to be Chairman of the Quarter Sessions.

For the defence it was objected, that the execution of the deed by Elizabeth Boice was not sufficiently proved : that the certificate was not valid—it did not state that she appeared in the Court of Quarter Sessions ; it certified that she declared that she freely, &c., not that the fact appeared to the Court ; it was not said that she was examined in open court, nor stated what court she appeared in, nor that it was held in or for the Eastern District ; and it was not stated in the certificate or proven that she was then above the age of twenty-one years.

The defendants then went into evidence of title in George

S. Jarvis, as a purchaser at a sale for taxes. A deed to him dated 13th January, 1856, from the Sheriff, in completion of the sale, was admitted. The plaintiff raised numerous objections to the validity of this sale; one was, that there was no seal to the Treasurer's warrant, under which the Sheriff sold.

The learned Judge left it to the jury to say whether there was a seal to the warrant. He also left the proof of the deed from the Boices to Zearon to them, explaining the rule of law as to deeds more than thirty years old coming out of the proper custody. And he reserved leave to the defendants to move to enter a nonsuit on the sufficiency of the certificate on the deed of the 8th October, 1821.

The jury found in favor of the plaintiff.

In Michaelmas term *M. C. Cameron*, Q. C., obtained a rule calling upon the plaintiff to shew cause why a nonsuit should not be entered on the leave reserved, or for a new trial, the verdict being contrary to law and evidence, and for misdirection, in telling the jury there was evidence for them of the execution of the deed to Peter Zearon, and of the sufficiency of the certificate as to Elizabeth Boice appearing before the Court of Quarter Sessions, and that she was twenty-one years of age when she executed the deed, and in directing that the Treasurer's warrant was insufficient without a seal.

Kerr shewed cause, citing *Allison v. Rednor*, 14 U. C. R. 463; *Jackson v. Robertson*, 4 C. P. 274; *Robinson v. Byers*, 13 Grant 388; *Monk v. Farlinger*, 17 C. P. 51; *Orser v. Vernon*, 14 C. P. 573; *Tiffany v. McCumber*, 13 U. C. R. 159; *Stayner v. Applegate*, 8 C. P. 451; *Morgan v. Quesnel*, 26 U. C. R. 539.

M. C. Cameron, contra, cited *Jolly v. Handcock*, 7 Ex. 820; *Ex parte Wallis*, 7 C. B. N. S. 303.

DRAPER, C. J., delivered the judgment of the Court.

The question arises upon two Statutes of Upper Canada, the 43 Geo. III. ch. 5, and the 2 Geo. IV. ch. 14, coupled with the Consol. Stat. U. C. ch. 85, sec 13.

The first of these acts enables any married woman having real estate in Upper Canada, and being above the age of twenty-one years, with the knowledge and consent of, and by any deed jointly with her husband, to convey the same, and such conveyance shall be as valid and effectual as if she were sole. Provided, that nothing in such deed shall have any effect to bar her or her husband, or her heirs, during the continuance of the coverture or after its dissolution, unless she shall appear in open Court in the Court of King's Bench, or before any Judge thereof at his Chambers, or before a Judge of Assize, and "be examined by the said Court or Judge, touching her consent, and shall freely and voluntarily, and without coercion, give her consent before such Court or Judge." This examination is to be certified by the Court or Judge, and the certificate must state the day on which such examination is taken, and is to be indorsed on the deed so executed by her and her husband.

The 2 Geo. IV., ch. 14, (passed 14th April, 1821), enabled the married woman to appear before the Quarter Sessions of the Peace in the district in which she might at the time be resident, or before the General Quarter Sessions of the Peace in any district, in cases in which the party resided out of the Province, at any time within twelve months after her execution of the deed; "and being examined by the Chairman of the Quarter Sessions in open Court touching her consent to alien and depart with her real estate, as in such deed may be mentioned, it shall and may be lawful for the said chairman to certify the same, in like manner as the same may at present be certified by the Court of King's Bench, or any Judge thereof," and the certificate shall have the same effect as a certificate under the 43 Geo. III.

Consol. Stat. U. C. ch. 85, sec. 13, enacts that, whenever before the 4th May, 1859, the requirements of the acts of Upper Canada respecting the conveyance of real estate in Upper Canada by married women, while respectively in force, had been complied with on the execution by any married woman of a deed of conveyance of real estate in Upper Canada then belonging to such married woman, such exe-

cution shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the land intended to be conveyed, although the certificate endorsed on such deed be not in strict conformity with the forms prescribed by the said acts, or either of them.

We think there is nothing in the objection that it is not stated in the certificate nor proved *aliunde* that Elizabeth Boice was twenty-one years old when she executed the deed. The presumption is that parties who professedly convey or contract are under no legal disability, until the contrary appears. Infancy is no doubt a disability, but the presumption is in favor of the full age of the party who impliedly asserts it by doing an act which an infant is not legally competent to do, and we see no difference as to disability arising from infancy between the case of a married or an unmarried female. The Statute only excludes the idea that it was dealing with any other disability except that of being a *feme covert*. There is no necessity for its being mentioned in the certificate.

I felt strongly inclined in the first instance against the sufficiency of the certificate, and I will not even now say that I have arrived at a conclusion free from all doubt, but we think the weight of argument is in the plaintiff's favor, especially having regard to the intention of the Legislature to remove objections arising from informality in certificates under the earlier Statutes upon this subject.

We can see no room to question, upon the apparent facts, that Joseph Anderson, whose signature to this certificate was proved, as also that he had been in former years Chairman of the Quarter Sessions for the Eastern District, signed this certificate in that capacity, and with a view to fulfil the statutory power conferred on the Court of Quarter Sessions only about six months before its date. It would have been a more formal and regular certificate if there had been in the margin "Eastern District, to wit," and if it had begun somewhat in this way:—"Be it remembered, that on this tenth day of October, &c., before the Court of Quarter Sessions, held at the town of Cornwall, in and for the said

Eastern District, personally appeared, &c.” For we concede that it was intended that the certificate itself should contain everything necessary to shew it was given by competent authority. But we do not see that evidence may not be admitted to shew that on the day named in the certificate the Court of Quarter Sessions was sitting, and that Joseph Anderson was the Chairman thereof, and so of other matters the existence of which is necessary in order that a certificate may be given, but which have no connection with the subject matter which the Statute requires to be certified.

Then at the date of the certificate the Quarter Sessions for the Eastern District were required by law to be holden at Cornwall, in that district, on the second Tuesday in October. In the year 1821 the second Tuesday in October fell (if we are not in error), on the 9th, and the certificate is dated on the following day. Then Mr. Anderson adds to his signature the designation of Chairman, though he does not say of what, but the certificate itself states the appearance of Elizabeth Boice “in open session” on that date, as well as that she appeared for a purpose which required her appearance in the Court of General Quarter Sessions. After the lapse of forty-six years it would be too much to require or expect direct proof that she did go to the Court on that day, and there is no record kept, so far as we are aware, of such proceedings; the law certainly does not make it necessary.

The objection taken as to the learned Judge’s direction was, first, for telling them there was evidence of the execution of the deed to Peter Zearon; but the deed came from the proper custody, and was more than thirty years old, and as to signing, sealing, and delivery proved itself; and, secondly, as to the sufficiency of the certificate of Elizabeth Boice appearing before the Court of Quarter Sessions. Now, we think there was evidence that she did appear, from the certificate itself, on the day named; and as to her appearance being before the Court of Quarter Sessions, and for the Eastern District, and that Mr. Anderson was Chairman, we have endeavoured to shew there was evidence, which, however, was not left to the jury, as the learned Judge ruled the

certificate to be sufficient, subject to the motion for nonsuit.

There remains then only the question of the sufficiency of the matter certified as a compliance with the Statute. It states that she was duly examined touching her consent to alien and depart with her lands within, (*i. e.*, in the deed), mentioned, and that she declared that she freely and voluntarily conveyed and relinquished the same without coercion, &c. The words of the two Statutes 43 Geo. III., and 2 Geo IV., are very closely followed, quite closely enough, as we think, when neither Act contains any form which is to be followed.

For these reasons we think that, so far as the plaintiff's case is concerned, the objections fail. As to the defendants' case, we have already decided in a similar case that the Statute requires that the warrant should be under the Treasurer's hand and seal, and that we have no authority to dispense with either.

The rule must be discharged.

Rule discharged.

WHITE ET AL. V. DUNLOP.

Licenses to cut timber—Inconsistent surveys—"General course" of a river.

The plaintiffs held a license, dated in September, 1860, to cut timber within certain limits, commencing "at the south branch of the Indian river, at the extremity of a limit licensed to A. & Co., ten miles above the forks." In 1842 a survey had been made by the Deputy Inspector of Woods and Forests, to determine A. & Co's limits, when the upper end, where the plaintiffs began, was marked by blazed trees; and in 1844 this survey was completed by one R., under instructions from the Department, and the line previously marked was then adopted, and recognized until March 1867. In that month a surveyor was instructed by the department to determine the defendant's limits, which were the same as those of A. & Co. and he made the upper boundary not so far from the forks as the previous surveys. His plan was returned to the Department, but no action taken on it. The plaintiffs then sued the defendant for cutting timber on the strip between the two surveys, the trespasses complained of having been committed apparently before the last survey was made.

Held, that they could not recover, for R.'s survey having been adopted and acted on by the Government, the boundary marked on the ground in accordance with it must govern until changed by competent authority.

Quære, how a boundary line following "the general course of the river" for a given distance is to be ascertained, and whether it is properly done by drawing a straight line from the starting point to a point on the river at that distance.

Quære, whether, as was assumed in this case, the holder of a license which has expired may sue for trees cut during its currency.

TRESPASS *quare clausum fregit*, to wit certain lands known as the timber limits of the plaintiffs in the unorganized tracts of country adjacent to the County of Renfrew, (setting out the boundaries) and cutting and taking away timber growing thereon. Second count, trespass to goods. Third count, in trover.

Pleas, 1. Not guilty. 2. To first count, lands and timber not the plaintiffs'. 3. To second count, goods not the plaintiffs'. 4. To third count, goods not the plaintiffs'. 5. To the whole declaration, leave and license.

The case was tried at Pembroke, in September, 1867, before Hagarty J.

It appeared that it was the practice in the department having charge of the Crown timber, and acting under the Provincial Statute 12 Vic., ch. 30, Consol. Stat. C. ch. 23, and the regulations in force for the time being, to grant

licenses to cut timber on the Crown lands, which are all made for a period expiring on the 30th April next after their respective dates; but a fresh license is granted to each party in every succeeding year, on his application and compliance with the regulations. The limits described by boundaries, within which each license is to have effect, are endorsed upon the license. Such licenses vest in the parties to whom they are granted the right to take and keep exclusive possession of the lands so described, and all rights of property in all trees, timber and lumber cut within the limits of the license during the term, and the right to bring actions against wrongful possessors or trespassers; and proceedings pending at the expiration of any such license may be continued to final termination as if the license had not expired.

The plaintiffs put in evidence a license, dated 20th September 1860, the limit being described thus, "to commence at the south branch of the Indian River, at the extremity of a limit licensed to Atkinson, Usborne, & Co., ten miles above the forks, and extend up six miles, more or less, to the source of the said Indian river as surveyed by Roney, and back as surveyed by Roney half way to the South branch of the Petewawe river, the upper boundary on the course North 21° East. Not to include any lots sold or located by the authority of the Commissioner of Crown Lands previous to this date." The plaintiffs put in six other licenses, one for each succeeding year, the last being dated 8th November 1866, and expiring on the 30th April 1867. The description of the limits was the same on each, varying a little in the exception as to lots sold or located, but not thereby affecting the question in this case.

It appeared however (on the defence) that Mr. John MacNaughton, who was in 1830 appointed Deputy Inspector of Woods and Forests, made a survey in the winter of 1843-4, in order to ascertain and determine the boundaries of the limit of Atkinson, Usborne & Co. That firm had a license before then, the limit of which extended fifteen miles, but an order was made restricting limits for the

future to ten miles, and to mark the reduced limit was Mr. McNaughton's object. He stated that up to the forks of the Indian river limits had already been marked. From the Forks he took the general bearing of the Indian river, and according to his view of that bearing he measured the distance, ten miles, and marked what he considered the upper boundary by blazing the trees, and at each end of this boundary line he squared a tree on the four sides. A few days before the trial he went to this line, which was still quite plain. His plan was filed in the office of the department.

In October 1844, Mr. J. J. Roney, a D. P. S., was instructed by the department to complete a survey of the limit of G. W. Osborne (the limit referred to as that of Atkinson, Osborne & Co.), and it appeared by the evidence of Mr. A. Russell, an officer in the department of Crown Lands acting as Crown Timber Agent, that Roney adopted this line so marked by McNaughton, which was always treated as the right line until a recent survey made by D. P. S. Wm. Bell.

In March 1867, Mr. A. J. Russell wrote officially to Mr. W. Bell the following letter; "Sir,—At your request for Messrs. A. & P. White, I have to give you the following instructions for the survey of the upper boundary on the south branch of the Indian River of license No. 161 of 1865-6" (the license to defendant hereinafter set out) "it being their lower boundary on the said south branch Indian river. The upper boundary of license No. 161 of 1865-6 should be determined by measurement from the forks of Indian river, up to the south branch thereof, until a direct distance of ten miles is attained, then running at the termination of that distance the upper boundary on the course N. 8° W. from the south branch of the Indian River to the north branch of the same, and from the said north branch continuing it on the same course to the point on it which is half way on that course between the said north branch of the Indian River and the south branch of the river Petewawa." The remainder of the letter did not affect the matter in question.

The boundaries of license No. 161, issued to the defendant on the 23rd October, 1865, were as follows:—"To commence at the forks of the Indian River, and extend up the south branch ten miles on its general bearing, and back on the course north 8° west to the north branch of the said Indian River, and from the said north branch three miles, more or less, on the course north 8° west, half way to the south branch of the Petewawe River; excepting all lots sold or located by the authority of the Commissioner of Crown Lands previous to this date."

Mr. W. Bell accordingly made a survey under these instructions, which were issued under the authority of the 13th section of the Crown timber regulations of the 13th June 1866:—"The Inspector of Crown Timber Agencies at Ottawa, and any officer thereunto authorized elsewhere, shall, at the written request of any party interested, issue instructions stating how the boundaries of timber berths should be run to be in conformity with existing licenses."

Mr. Russell stated that it was intended that Bell's line should be the governing line. On the 30th April, 1867, Bell's survey was returned; nothing was done on it, and no notice of it was given to the parties.

Mr. Russell said, "The general bearing of the river means a straight line from the commencement on the river to a point on the river where the line terminates at the distance given." Mr. Russell being recalled, said that the defendant's limit was that which at first was Atkinson, Usborne & Co's: that as the Crown had measured the lines themselves, he considered Atkinson & Co. would not be trespassers against the Crown, as Roney's survey corresponded with McNaughton's, and was made to ascertain the upper boundary of Atkinson's limits.

The upper boundary of defendant's limit (identical with that of Atkinson, Usborne & Co.) as ascertained by Mr. Bell, differed from that marked on the ground by McNaughton. Mr. Bell stated, as a witness for the plaintiffs, that he found the old line (McNaughton's), and that it was nearly $10\frac{7}{8}$ miles from the Forks.

The plaintiffs claimed to recover for timber cut by the

defendant in the space between these two lines in different seasons, beginning with 1862-3, but as the damages were agreed upon by the parties if the plaintiffs were entitled to recover, it is unimportant to note the details.

The learned Judge was of opinion that the plaintiffs were not entitled to recover, and it was agreed that the plaintiffs should be nonsuited, with leave reserved to them to move to enter a verdict for them for \$232.

In Michaelmas term *D. B. Read*, Q. C., obtained a rule *nisi* according to the leave reserved.

Deacon shewed cause.

DRAPER, C. J., delivered the judgment of the Court.

This action was commenced on the 13th April, 1867. Mr. Bell's map is dated at Pembroke on the 16th of that month. It shews the places at which the alleged trespasses were committed, and leads to the result stated by one witness, that the trespasses were committed before Bell's survey was made and the line which the plaintiffs contend forms their upper boundary was ascertained. Mr. Bell's map is not certified by any officer in the Crown Lands or Crown Timber department as adopted there, though Mr. Russell stated that it had been returned. MacNaughton's and Roney's plans are both certified, and it is sufficiently clear that the latter has been the one acted upon or recognized in reference to these timber limits.

It is after more than twenty years acquiescence on the part of the Crown Timber department in Roney's survey, in and by which the upper boundary line as surveyed and marked by MacNaughton was adopted, that instructions were issued to Mr. W. Bell, and at his request made on behalf of the plaintiffs, to resurvey this boundary. Their object is obvious, and it is at least probable that they were aware of Mr. Bell's view as to the correctness of this boundary, and were therefore willing, if not desirous, that he should be instructed by official authority to resurvey it.

But we think it is to be regretted that a different reply

was not given to his application. It would have been consistent with the spirit of the 13th section of the regulations referred to, to have told him that the boundary in question had been settled for many years, and that no reason was suggested sufficient to justify the department in throwing any doubt upon it. However, the instructions were issued, and this litigation is the consequence.

It is unnecessary to determine whether "the general course of the river" is to be ascertained according to Mr. Bell's view, in which, however, Mr. Russell apparently concurs, or whether Mr. MacNaughton took the proper method, the results of which were adopted by Mr. Roney. If it is to be dealt with as a question of law, which I do not assert, I am not prepared to say that the general course of a river is to be ascertained by drawing a straight line either from its source or its termination, for any number of miles more or less which may be determined on, so as to strike the river at the end of a line of the given length. It does not at first strike me that the general course of part of a river, perhaps not a tenth part, will necessarily be the general course of the whole stream. I do not venture to assert that such a mode may not attain a correct result, but I am glad that there is no necessity for my deciding the question, and perhaps the general course for ten miles was all that was intended in this case.

But we have no doubt, on grounds quite independent of such a question, that this rule must be discharged. We think that Roney's survey, even if not perfectly accurate, has been sanctioned, adopted, and acted upon by the Government officers, and the upper boundary in question, being marked on the ground according to it, must be treated, until a change is made by competent authority, as the true upper boundary of the limit of Atkinson, Usborne & Co., which limit the defendant held under an annual license in the usual form at the several times when the alleged trespasses were committed. The plaintiffs' licenses in force at each of those times were in terms bounded by the extremity of the limit licensed to Atkinson, Usborne & Co., which it

is conceded is the same limit which has been licensed to the defendant; and if, as Mr. Russell suggests, the Crown could not treat either Atkinson, Usborne & Co. or the defendant as trespassers for cutting timber within the limit so marked, we do perceive how the licensee of the Crown, especially with a limit described as is indorsed on the plaintiffs' license, can have a better right.

If any change in these boundaries is considered to be proper, in view of all the circumstances, there can be no difficulty in making it. The licenses are issued every year, and a description which will substitute Mr. Bell's line for Mr. McNaughton's being indorsed on the defendant's license will effectuate it. We speak only of the *power* to make a change; we know nothing of the circumstances, which might or might not render such a change just and proper.

We have abstained from putting a construction on the Consolidated Statutes of Canada, ch. 23, sec. 2., because it is unnecessary for the disposal of this case. It has been assumed in this action, that a holder of a license which has expired may institute an action for cutting trees during the time his license was current, though during its currency he took no proceedings. The concluding sentence of this section seems unnecessary if this assumption be correct.

Rule discharged.

WILLIAM MATHERS V. JOHN LYNCH.

Insolvent—Chattel mortgage—Insolvent Act, 1864, sec. 8, sub-secs. 1, 2, 3, 4.

Declaration in detinue and trover for goods. Plea, that one J., the owner, being a debtor unable to meet his engagements and in contemplation of insolvency, mortgaged the goods to the plaintiff, and within thirty days thereafter made a voluntary assignment in insolvency to the defendant, the official assignee: that the mortgage was made to the plaintiff as a creditor of and surety for J., whereby the plaintiff obtained an unjust preference over J.'s other creditors, who were thereby injured and obstructed, wherefore the mortgage was void, and the defendant as assignee took the goods.

The plaintiff replied that J. being a retail dealer, and wanting goods to carry on his business, asked the plaintiff to endorse notes to enable him to purchase them: that the plaintiff consented, on condition that J. on receiving the goods should secure him against loss by a mortgage thereon, and on the other goods in J.'s store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise the plaintiff might sell the goods for his own protection: that the plaintiff accordingly endorsed, and J. with the notes purchased goods, which he mortgaged to the plaintiff, as agreed on, with other goods, for the *bonâ fide* and sole consideration of perfecting the said agreement: that J. afterwards, without the plaintiff's consent, assigned to the defendant, who took with notice of the mortgage, and was proceeding to sell the goods, when the plaintiff forbade him, and demanded them.

Held, that the replication was good, for that the plaintiff only became a creditor by the actual transaction, in which he gave the equivalent in the new goods purchased procured on his credit; and under these circumstances, the plaintiff being ignorant of J.'s position, the mortgage was not avoided by the Insolvent Act, (sec. 8, sub-secs. 1, 3, 4), though its effect might be to delay creditors.

Quære, whether it was voidable under sub-sec. 2.

DECLARATION.—First count, detinue for goods; second count, for conversion of goods; third count, money had and received.

Fifth plea. To the first and second counts; that before the conveyance or chattel mortgage to the plaintiff hereinafter mentioned, one John Mathers was the proprietor and possessed of the goods and chattels in the said first and second counts mentioned, and being so possessed thereof, but being then a debtor unable to meet his engagements, in contemplation of insolvency, the said John Mathers, by indenture bearing date the 17th day of September, 1867, for the purpose and consideration in said indenture mentioned, conveyed and transferred the said goods to the plaintiff,

subject to a certain proviso for redemption in said conveyance or mortgage contained, and that said John Mathers afterwards, and within thirty days from the date of and day of execution of said chattel mortgage, to wit, on the 11th day of October, 1867, duly made and executed a voluntary deed of assignment under and by virtue of the Insolvent Act of 1864, and the amendment of 1865, of all his estate and effects to the defendant, who then was and still is an official assignee in insolvency, duly appointed in that behalf in and for the county of Peel; and that said conveyance or chattel mortgage made by the said John Mathers was so made by way of security to the plaintiff as a creditor of, and also as a surety for the said John Mathers, and whereby the plaintiff obtained an unjust preference over the other creditors of the said John Mathers, and whereby the creditors of the said John Mathers were injured and obstructed; by reason whereof the said conveyance or chattel mortgage was, by force of the Statute in such case made and provided, null and void; and upon the execution of the said assignment to the defendant as such official assignee, and all the said goods and chattels then remaining being then in the possession of the said John Mathers, the defendant, by virtue of said assignment in insolvency, took possession of all the said goods and chattels so then remaining, and detained the same by virtue thereof for the benefit of the creditors of the said insolvent, as he lawfully might for the cause aforesaid, which is the alleged detention and conversion in the said first and second counts respectively mentioned.

Replication.—That on the 14th day of September, 1867, John Mathers, in the said fifth plea mentioned, being then a merchant and retail dealer in goods, wares, and merchandise, in the town of Brampton, in the county of Peel, and being desirous of purchasing in the city of Toronto, in the county of York, a large quantity of goods in the way of his trade and business as such merchant and retail dealer, for supplying his store at Brampton, aforesaid, and carrying on his said business, applied to the plaintiff, and requested him to endorse three several promissory notes to be made by the

said John Mathers, payable to the order of the plaintiff, as follows, that is to say, one of such promissory notes being for the sum of \$668, payable five months after date, one other of such promissory notes being for the sum of \$669.62, payable six months after date, and the other of such promissory notes being for the sum of \$668, payable seven months after date, for the purpose of enabling him, the said John Mathers, to purchase such goods in the way of his trade as aforesaid with the said promissory notes when so endorsed by the plaintiff; and the plaintiff agreed to indorse the said promissory notes for the purpose aforesaid, upon the express condition and agreement made by the plaintiff with the said John Mathers, that immediately upon the said goods being so purchased, and being delivered at the store of the said John Mathers at the said town of Brampton, he, the said John Mathers, should well and effectually secure and indemnify the plaintiff against all loss, damage and claim in respect of such indorsements, by executing to the plaintiff a chattel mortgage as well upon the goods so to be purchased with the said promissory notes when endorsed by the plaintiff, as upon other goods and chattels of the said John Mathers then situate at the said town of Brampton, and that upon such chattel mortgage being executed he, the said John Mathers, should sell the said goods and chattels so to be purchased as aforesaid, as also such other goods and chattels to be comprised within such chattel mortgage as should consist of store goods, by retail only at the store of the said John Mathers in the way of his trade, and should from the proceeds of such sales from time to time set apart and apply a sufficient sum towards the payment of the said promissory notes to be indorsed by the plaintiff, for the purpose of relieving the plaintiff against all liability in respect of such endorsements; and that the said chattel mortgage should contain a covenant or proviso to the effect that, if the said John Mathers should dispose or attempt to dispose of the said goods and chattels otherwise than in accordance with the consent in writing of the plaintiff for that purpose first had and obtained, it should

be lawful for the plaintiff absolutely to sell the said goods and chattels for his own protection, And the said John Mathers agreed to such terms and conditions, and thereupon the said John Mathers, on the said 14th day of September, made his three several promissory notes for the respective amounts herein aforesaid, payable to the order of the plaintiff at the respective times herein aforesaid, and the plaintiff indorsed the same upon the terms and conditions aforesaid, and contemporaneously with such indorsements the said John Mathers, by an instrument duly executed under his hand and seal, for the purpose of giving effect to such agreement as aforesaid, upon the same 14th day of September, covenanted with the plaintiff that he, the said John Mathers, should and would without delay, and within five days therefrom, well and effectually secure the plaintiff against his said indorsations by a good and sufficient chattel mortgage to be executed as herein aforesaid agreed between the said John Mathers and the plaintiff, as the condition upon which the plaintiff agreed to endorse the said promissory notes. And thereupon, and upon the same 14th day of September, he, the said John Mathers, at the said City of Toronto, with the said promissory notes so indorsed by the plaintiffs, purchased goods in the way of his trade and business to the amount in the whole of \$2005.62, and he became possessed of the said goods under and in virtue of the said indorsations of the plaintiff, and of the said agreement in that behalf hereinbefore mentioned made between him and the plaintiff; and thereupon, and with the intent and for the purpose of giving to the said plaintiff such chattel mortgage as aforesaid, he, the said John Mathers, caused the said goods to be forwarded to his place of business at the town of Brampton aforesaid, and thereupon the said John Mathers and the plaintiff proceeded to the said town of Brampton for the purpose of completing the said agreement, and in pursuance thereof the said John Mathers, on the arrival of the said goods so purchased as aforesaid at his store at Brampton aforesaid, and on the 17th day of the same month of September, at the said town of Brampton,

executed the said chattel mortgage in the said fifth plea of the defendant mentioned, as well upon the said goods so purchased as aforesaid as upon other goods and chattels in the said mortgage mentioned, for the *bonâ fide* and sole consideration of perfecting the said agreement upon which the plaintiff had indorsed the said promissory notes as aforesaid; and by the said chattel mortgage the said John Mathers, among other things, covenanted with the plaintiff, that in case the said John Mathers should attempt to sell, dispose of, or in any way part with the said goods and chattels, or any of them, without the consent of the plaintiff to such sale or disposal first had and obtained in writing, then it should and might be lawful for the plaintiff absolutely to make sale of the said goods and chattels, and to receive the proceeds thereof to be applied in payment of the said promissory notes, and for the protection and indemnity of the plaintiff; and the said chattel mortgage so executed was duly filed in the office of the Clerk of the County Court of the county of Peel, on the 18th day of the same month of September, according to the provisions of the Statutes in that behalf; and in pursuance of the said agreement whereon the same was executed as aforesaid, the plaintiff, at the time of the execution of the said chattel mortgage, by a permission in writing signed by him, consented to the said John Mathers selling the goods and chattels comprised in the said mortgage by retail only, in the way of his trade at his said store in Brampton, upon condition that, as the said John Mathers had agreed with the plaintiff as aforesaid, the proceeds should be applied towards payment of the said promissory notes endorsed by the plaintiff. And the plaintiff further saith, that after the execution of the said chattel mortgage under the circumstances and for the consideration aforesaid, and while the said John Mathers was possessed of the said goods and chattels in the said chattel mortgage comprised under and subject to the terms and provisions thereof, and on the 11th day of October, 1867, by the deed of assignment of that date in the said fifth plea mentioned, and without the consent of the plaintiff, he, the said John

Mathers, assigned all his, the said John Mathers', estate and effects to the defendant, he, the defendant, then being an Official Assignee in insolvency duly appointed in that behalf in and for the County of Peel; and the defendant accepted such assignment with notice of the said chattel mortgage and of the right, title, and interest of the plaintiff thereunder. And the plaintiff says that the said defendant afterwards took possession of the said goods and chattels in the said chattel mortgage comprised, and then remaining in the possession of the said John Mathers, under the provisions and terms thereof; and afterwards the defendant, without the consent of the plaintiff and against his will, and in disregard and repudiation of the right, title, and interest of the plaintiff in the said goods and chattels in the said chattel mortgage comprised and then remaining, advertised the same for sale at public auction, and was proceeding to offer the same for sale at wholesale invoice prices; and there upon the plaintiff, in assertion of his right, title and interest under the said chattel mortgage, forbade the defendant to proceed with such sale, and demanded of the defendant the surrender to the plaintiff of the goods and chattels in the said chattel mortgage comprised, and yet remaining to be dealt with under and in accordance with the provisions in the said chattel mortgage, and caused to be delivered to the defendant a notice in writing, signed by the plaintiff, directing the defendant not to intermeddle with the goods and chattels comprised in the said chattel mortgage in any manner at variance with the terms and conditions thereof, or the rights and interest of the plaintiff therein, and with such notice caused to be delivered to the defendant a copy of the said chattel mortgage. And the plaintiff saith that he brought this action not only for the grievances in the said fifth plea admitted, but for that after the plaintiff had forbid the defendant to proceed with the sale so advertised as herein aforesaid, and after the plaintiff had demanded of the defendant the surrender to the plaintiff of the goods and chattels in the said chattel mortgage comprised, and then remaining to be dealt with under and in accordance with the provisions of the said chattel mortgage, and after the

delivery of such notice to the defendant as herein aforesaid, directing him not to intermeddle with the said goods and chattels in the said chattel mortgage comprised in any manner at variance with the terms and conditions thereof, he, the defendant, in disregard and repudiation of the right, title and interest of the plaintiff under the said chattel mortgage, wrongfully detained and still does detain the plaintiff's goods in the said first count mentioned, comprising a parcel of the goods and chattels so as aforesaid purchased with the said promissory notes so indorsed by the plaintiff as aforesaid, and parcel of the other goods and chattels in the said chattel mortgage mentioned, and has also wrongfully, and without the consent of the plaintiff, and against his will, deprived the plaintiff of the use and possession of, and has sold and converted to his the defendant's own use, the plaintiff's goods in the said second count mentioned, comprising other parcel of the goods and chattels so purchased as aforesaid with the said promissory notes so indorsed by the plaintiff as aforesaid, and other parcel of the other goods and chattels in the said chattel mortgage mentioned.

Defendant demurred to the replication, and the plaintiff joined in demurrer, and took exceptions to the plea.

Gwynne, Q. C., for the plaintiff, cited *Whitwell v. Thompson*, 1 Esp. 72; *Baxter v. Pritchard*, 1 A. & E. 456; *Rose v. Haycock*, 1 A. & E. 460, note; *Hutton v. Cruttwell*, 1 E. & B. 15; *Bittlestone v. Cooke*, 6 E. & B. 296; *Graham v. Chapman*, 12 C. B. 85; *Pennell v. Dawson*, 18 C. B. 355; *Pennell v. Reynolds*, 11 C. B. N. S. 710, 720; *Abbott v. Pomfret*, 1 Bing. N. C. 462; *Atkinson v. Brindall*, 2 Bing. N. C. 225; *Lindon v. Sharp*, 6 M. & G. 895; *Siebert v. Spooner*, 1 M. & W. 714; *Bell v. Simpson*, 2 H. & N. 410; *Harris v. Rickett*, 4 H. & N. 1; *Swith v. Timms*, 1 H. & C. 849; *Hale v. Allnutt*, 18 C. B. 506; *Ross v. Elliott*, 11 C. P. 221; *Woodhouse v. Murray*, L. R. 2 Q. B. 634, 640; *Mercer v. Peterson*, L. R. 2 Ex. 304; *Whitmore v. Claridge*, 8 Jur. N. S. 1059; *Sm. Merc. L.*, 6th ed., 589.

Robert A. Harrison, contra.

The clauses of the Statute bearing upon the question are cited in the judgment.

HAGARTY, J. delivered the judgment of the Court.

The one substantial question was argued before us—whether this chattel mortgage, so made within thirty days of the assignment in insolvency and alleged to be executed in contemplation of insolvency, can be upheld against the assignee.

The argument for the defence is, that this dealing with the plaintiff within thirty days of the assignment in insolvency, the debtor then being insolvent and in contemplation of insolvency, is avoided by the Statute: that it was by way of security to the plaintiff as a creditor, and that the plaintiff obtained an unjust preference over other creditors; the plea seeking to bring it within sub-sec. 4 of sec. 8 of the Insolvent Act of 1864.

The plaintiff's argument rests mainly on this—that he was not a creditor of the insolvent, in the sense of the Statute: that he in good faith made an advance of money to him to enable him to carry on his trade, and made such advances on the security of his stock-in-trade, only becoming a creditor by the transaction by which he obtains the security.

We agree that the replication shews it to be all one transaction, the endorsement made on the express conditions that the mortgage should be given on the freshly purchased goods as well as the old goods, and that the subsequent acts up to the perfecting of the security were only referable to the one contract and consideration. This is plain on the late case of *Mercer v. Peterson* (L. R. 2 Ex. 304, recently confirmed in the Ex. Ch.) The subsequent giving of the mortgage has a retrospective effect, and must be considered as made on the day the agreement was made. Therefore the mortgage forms part of the immediate transaction by which the plaintiff first becomes a creditor.

The plea asserts that this was done by John Mathers in contemplation of insolvency, and when he was unable to meet his engagements, and within the thirty days. The replication does not traverse these allegations, nor does it allege that the plaintiff had no notice or cause to believe that John Mathers was insolvent, but asserts it was all

done in the way of his trade, and for the *bonâ fide* and sole consideration of perfecting the agreement made between them, and securing the plaintiff on the endorsements of the notes, by which John Mathers was enabled to purchase the new goods.

Apart from the provisions of the insolvent law, we see no objection whatever to the transaction stated in the replication as against creditors, under the Statute of Elizabeth. If he obtained the new goods on the credit of the plaintiff's endorsement, it would stand, we think, on the same footing as if the plaintiff had advanced the proceeds of the notes to him in cash on the bargain to get security both on the new and old goods.

Now under the Act the clause chiefly in point (sec. 8 sub-sec. 4), says, "If any sale, deposit, pledge, or transfer, be made by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any goods, effects, or valuable security be given by way of payment by such person to any creditor, whereby such creditor obtains or will obtain an unjust preference over the other creditors, such sale," &c., "shall be null and void * * * and if the same be made within thirty days next before execution of a deed of assignment * it shall be presumed to have been so made in contemplation of insolvency."

Again, sub-sec. 3 avoids all contracts or conveyances made by a debtor with intent fraudulently to impede, obstruct, or delay, or to defraud his creditors, made with the knowledge of the person contracting, and which have the effect of impeding creditors, even when such contracts are in consideration of marriage.

And sub-sec. 2 provides, that contracts or conveyances for consideration, by which creditors are injured or obstructed, made by a debtor unable to meet his engagements with a person ignorant of such inability, and before it has become public and notorious, but within the thirty days, are *voidable* and may be set aside by any Court of competent jurisdiction, upon such terms as to the protection of such persons from actual loss or liability by reason of such contract, as the Court may order.

In sec. 3, where the different acts of bankruptcy are set out, there is only one in any way bearing on this case, subsec. c. "If he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them."

It is laid down in *Doria and Macrae* on Bankruptcy, Vol. I. p. 150, citing *Hutton v. Cruttwell* (17 Jur. 392. 1 E. & B. 15) that "a bill of sale given to secure an advance made on the faith of the security, to enable a trader to carry on his business, is not an act of bankruptcy, although it would be if the consideration were either wholly or partly an antecedent debt contracted without security."

In *Deacon* on Bankruptcy, Vol. I., p. 8, it is said, "Where money passes, it will be found that the tendency of modern cases is to discourage the application of technical rules as a test of fraud, and to assist mercantile convenience as far as possible, by not allowing a man who acts honestly to be prevented from raising money on an emergency upon the security of his stock-in-trade."

And in the same vol., p. 71, "It makes no difference whether the assignment is made to secure a present debt, or to *indemnify a surety* who is only likely to become a creditor; for the mischief arising to the bankrupt's other creditors from the undue preference is precisely the same." This would be void: *Hassells v. Simpson* (Doug. 89) *Smith v. Cannan* (2 E. & B. 37). See also *Deacon* on Bankruptcy, Vol. I, p. 75, as to mortgages for advances.

In *Whitwell v. Thompson* (1 Esp. 72) Lord Kenyon said, "all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a by-gone and before-contracted debt, but that it never could be taken to be law, that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him."

In *Hutton v. Cruttwell* (1 E. & B. 15) Lord Campbell says, "This is the common case of a bill of sale *bonâ fide* given to secure an advance made on the faith of the security, to enable a trader to carry on his business; and it is well established law that such a bill of sale is not an act of bankruptcy, although it would be an act of bankruptcy if the consideration were either wholly or partly an antecedent debt, contracted without security."

In this case the jury had found that the deed was not executed to delay or defeat creditors, and that the payment was not made to the defendant in contemplation of bankruptcy.

In *Bittlestone v. Cooke* (6 E. & B. 297) Lord Campbell said, "I think that a conveyance by a trader of goods with a view to obtain future advances is not necessarily as a matter of law an act of bankruptcy, though the whole of the trader's stock, present and future, is included in the conveyance." There the property pledged was worth £6000, the outside of advances stipulated £1800. Erle J. says, "It is probable that in the result this has delayed creditors; and if the trader had known that such must be the effect, it might have been fraudulent." The point is discussed at length in this case. *Whitmore v. Claridge* (8 Jur. N. S. Q. B. 1059) is to the same effect.

The two latest cases are *Woodhouse v. Murray* (L. R. 2 Q. B. 634) and *Mercer v. Peterson* (L. R. 2 Ex. 304).

The Queen's Bench case was very peculiar, and was partly governed by the Imperial Statute respecting seizure and sale by the Sheriff. Cockburn, C. J., reviews the law, and points out how an assignment by an insolvent of all his effects which prevents him carrying on business or paying his creditors, or distributing his property amongst them, is void, and then notices the exception in *Bittlestone v. Cooke*, where the trader in disposing of his effects gets something which is an equivalent; and that case shews that it need not be an actual equivalent in value * * He adds "I do not say that an equivalent must necessarily be of money's worth."

In *Mercer v. Peterson*, the transaction was just outside the twelve months before the bankruptcy. It was the case of a bill of sale of all the effects in consideration of an existing debt and of a future advance. It being over the twelve months the Court held that it was not *per se* an act of bankruptcy, and on the other point, that it was not invalid or fraudulent against the assignee.

On these pleadings it does not appear whether the assignment to the plaintiff covered all the debtor's property, as in many of the cases. He may have been possessed of various other properties. It is stated that he was then unable to meet his engagements, and did the act in contemplation of insolvency. It is not averred that the plaintiff was aware of his position, or had any such contemplation in his view. On the contrary, we find in the replication that the purchase of the new goods on the plaintiff's credit was in the way of trade as a retail dealer, for supplying his store and carrying on his business, and that the notes were endorsed for that purpose and mortgage given for the *bonâ fide* and sole consideration of perfecting the agreement.

These allegations rebut all idea of the plaintiff having any contemplation of John Mathers doing as he did in contemplation of bankruptcy.

It is therefore a security taken on the new goods (which we consider in the same position as if sold to John Mathers by the plaintiff) and some other goods which John Mathers had. There is no suggestion in the pleadings of the security being disproportioned to the advance.

We think the plaintiff only became a creditor by the actual transaction, in which he gave the equivalent in the new goods procured on his credit.

All the authorities draw a sharp distinction between a transaction by which act a part of a trader's estate is made over to a creditor in payment or security for an existing debt, and to a person who advances money or gives property to the trader, thus becoming a creditor for the first time by the actual dealing itself. We think that this transaction does not come within either the first, third, or fourth clauses of sec. 8 of the Act, already cited.

The defendant strongly relies on its having taken place within the thirty days.

Conceding, for the argument, that its effect is to injure or obstruct creditors, in the words of sub-sec. 2, it may be perhaps regarded as "a contract or conveyance for consideration * * made by a debtor unable to meet his engagements with a person ignorant of such inability, and before it has become public and notorious, but within thirty days next before the execution of a deed of assignment."

If so it is voidable, and may be set aside by a competent Court on such terms as to the protection of such persons from actual loss or liability by reason of such contract as the Court may order. At the most this contract may possibly fall within this clause. The plaintiff has become the insolvent's surety to about \$2000, to which amount goods have been purchased, the bulk of which, if not all, must be in the hands of the assignee, and he has, as we think, in good faith, ignorant of John Mathers' insolvency, on good consideration contracted with him for security on these goods and other goods.

We have no power to settle any terms for the plaintiff's protection. We can only determine the right of property. Another tribunal must adjust the terms.

The estate may desire to be relieved from the contract on indemnifying the plaintiff.

We think the plaintiff is entitled to our judgment on these pleadings.

The transaction as stated in the replication seems to us not to be absolutely avoided by the law.

We felt some difficulty as to the allegation that it was in contemplation of insolvency, but we think the replication frees the transaction from illegality either under the insolvent law or otherwise.

It was a very natural, and possibly highly beneficial arrangement for the trader to make, at least so far as it was possible for the plaintiff to foresee.

Its effect might be, as is remarked in many of the cases, to delay creditors, but that alone does not avoid a transaction otherwise lawful; nor are we prepared to hold that the

mere fact that the trader contemplated insolvency will alone defeat the remedy and security of a person dealing with him, as the plaintiff seems to have done, in the way of business, in an ordinary transaction, and having no reason whatever to suspect what may have been passing in the trader's mind.

Judgment for plaintiff.

NEIL V. MCMILLAN.

Practice—Entering judgment nunc pro tunc.

The plaintiff on the 22nd March, 1866, obtained a verdict, and died on the 26th June, having in April previous assigned the verdict to one C. On the 24th September a rule *nisi* for a new trial was discharged, and in October C. proceeded to enter judgment. The Master refused to tax full costs, and on application to the Judge who tried the case he desired to hear the defendant's attorney. Notice of an appointment to argue the matter was given, but owing to enlargement or to the absence of the Judge from Chambers, it was not argued until February, and a certificate was granted in April. Application was then made in Chambers to enter judgment *nunc pro tunc*, but the summons stood over by consent, and in August, 1867, C., having been appointed the plaintiff's administrator, renewed the application in Chambers, which was refused on the 2nd October.

The Court, under the circumstances, made absolute a rule to enter such judgment, without costs.

IN last Michaelmas term, *Harrison*, Q. C., obtained a rule calling on the defendant to shew cause why judgment in this case should not be entered *nunc pro tunc*, and why James F. Cross should not be at liberty to enter a suggestion of the death of Neil, the plaintiff, and that the said Cross was administrator, &c., on grounds disclosed in affidavits and papers filed and refiled; and why the order of Mr Justice Adam Wilson, of the 2nd October, 1867, discharging a summons for a like purpose, should not be rescinded.

During the same term *J. B. Read* shewed cause, citing *Peirce v. Derry*, 4 Q. B. 634; *Lawrence v. Hodgson*, 1 Y. & J. 368; *Bates v. Lockwood*, 1 T. R. 637; *Lanman v. Lord*

Audley, 2 M. & W. 535; *Freeman v. Tranah*, 12 C. B. 406; *Neil v. McMillan*, 3 U. C. L. J. 265, N. S.; C. L. P. A. sec. 139; Rule of Court, T. T. 1856, No. 47; *Miles v. Williams*, 9 Q. B. 47; *Evans v. Rees*, 12 A. & E. 167.

James Paterson supported the rule, and cited *Denison v. Holiday*, 26 L. J. Ex. 227; *Moore v. Roberts*, 27 L. J. C. P. 161.

The facts of the case are sufficiently stated in the judgments.

MORRISON, J.—It appears from the papers and affidavits filed, that the plaintiff on the 22nd March, 1866, recovered a verdict against the defendant for trespass, &c., and \$100 damages: that on the 25th of April the plaintiff sold and assigned his interest in such verdict and cause of action to the present applicant, Cross, giving him authority to enter judgment and issue execution thereon: that on the 22nd May, 1866, the defendant applied for a new trial, upon which a rule *nisi* was granted, and in due course the case was argued: that on the 26th June the plaintiff died: that afterwards, on the 24th September, in the vacation after Trinity term, judgment was given, discharging the rule *nisi* and refusing a new trial: that on or about the 4th of October, 1866, notice was given to tax costs on entering judgment: that before the Master objection was made by the agent of the defendant's attorney to the allowance of Superior Court costs, which objection was sustained by the Master, and judgment was not entered: that on the 4th October, 1866, application was made to the learned Chief Justice of the Common Pleas, before whom the cause had been tried, at his house, for a certificate for full costs, which the Chief Justice then declined to give without first hearing the defendant's attorney: that the defendant's agent was notified and an appointment made by the parties for arguing the matter before the Chief Justice; and either by enlargement, or from the absence of the Chief Justice on circuit and not being in Chambers when he ordered the matter to be heard before him, nothing appears to have been done

until the 9th February, 1867, when the point was discussed, and on the 5th of April, following, the Chief Justice granted a certificate entitling the plaintiff to Superior Court costs: that an application was then made to a Judge in Chambers to enter judgment *nunc pro tunc*, which was opposed by the defendant's attorney's agent, on the ground that no personal representative of the deceased plaintiff had been appointed, and the summons was then by consent of both parties allowed to stand, and nothing was done upon it: that on the 17th August, 1867, Cross obtained letters of administration to the estate of the plaintiff; and on the 26th August Cross made a similar application to the present in Chambers, which was on the 2nd October last discharged by Mr. Justice Adam Wilson (*Neil v. McMillan*, 4 P. R. 145.)

It thus appears that two terms elapsed between verdict and the delivering of the judgment of the Court, discharging the rule for a new trial, and during all that time the delay was occasioned by the act of the Court, and not by laches on the part of the person representing the plaintiff. And to enable the applicant to enter judgment so as not to be open to error in that respect, it was necessary to apply to the Court, and obtain leave to enter judgment *nunc pro tunc*; and it is quite clear, upon the authority of many decided cases, that such a rule would be granted to prevent the effect of the Statute of Charles.

In the present case the question is, whether we should now do what we would have done if the application had been made shortly after the delivery of the judgment disposing of the application for a new trial.

In *Evans v. Rees* (12 A. & E. 175), Lord Denman says: "The power of the Court to enter judgment *nunc pro tunc* does not in any respect depend upon the Statute of 17 Car. II. c. 8. It is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of the Court, and has been uniformly exercised, unless the delay is imputable to the laches of the party applying. The effect

of the judgment when entered may depend on the Statute 17 Car. II. ch. 8, but the power to enter does not.

The only objection that can be urged in this case is the delay since the judgment of the Court was pronounced, but we think it has been accounted for by the Master refusing to tax full costs and the delay occasioned in obtaining the certificate for full costs, and by reason of the objections taken at several stages by the defendant. We cannot say that the representative of the plaintiff has not proceeded as promptly as the circumstances of the case would permit him.

We are of opinion that the rule should be made absolute, but without costs.

HAGARTY, J.—The plaintiff died between verdict and the judgment refusing a new trial. The defendant moved for a new trial, and this motion, and the action of the Court thereupon, caused the lapse of the terms Easter and Trinity before judgment could be signed, so that the case is thus far free from difficulty insuperably pressing upon the Court in *Freeman v. Tranah* (12 C. B. 406); see also *Miles v. Williams* (9 Q. B. 47). The rule would seem to be inflexible, that unless the lapse of the two terms was the act of the Court, relief cannot be given.

I think justice is satisfied by making this rule absolute without costs.

Rule absolute.

REGINA V. LAW AND GILL.

Conviction—Practice.

On applications to quash convictions the convicting Justice must be made a party to the rule.

McMichael obtained a rule calling on Law and Gill to shew cause why certain convictions against them should

not be quashed, and the prosecutor be permitted to proceed with the complaint against them, on the ground that the magistrate had no jurisdiction in the matter, for several reasons set out in the rule.

On the rule being moved absolute, *Harrison*, Q. C., shewed cause, and objected that the convicting magistrate was not made a party to the rule, and that he had no notice of this application, referring to the case of *Regina v. Peterman*, 23 U. C. R. 516.

McMichael supported the rule, contending that it was not necessary the Justice should be notified of the application.

MORRISON, J., delivered the judgment of the Court.

The books of practice afford very little information as to the form of the rule in applications of this nature. We have looked into many of the reported cases of motions to quash convictions, both in the English Courts and our own. During the last few years applications of this nature have been frequently made, and we find that in cases in this country the convicting Justice is called upon in the rule to shew cause. See *Regina v. Shaw* (23 U. C. R. 616), *Regina v. Dawes* (22 U. C. R. 340), *Regina v. Craig* (21 U. C. R. 552), *In re Joice* (19 U. C. R. 197), *Regina v. Huber* (15 U. C. R. 589.)

In *Regina v. Peterman*, the convicting Justice was not notified of the *certiorari*, nor was he a party to the rule to quash, the only parties called on to shew cause being the complainant and the Justices of the Sessions, who affirmed the conviction on appeal; and the note of the case shews that the Court there held that it was proper in them to see that the convicting Justice was apprised of the proceedings, inasmuch as he was exposed to an action if the conviction should be quashed. If there is any meaning or object in that decision, it is that the Justice should have notice of the application to quash. By Statute he was entitled to notice of the *certiorari*.

In England the general practice appears to be, that when the record of the conviction has been returned its validity is brought under formal discussion, by the case being inserted in the Crown paper, and argued on certain days called Crown Paper Days in due order: *Chitty's General Practice* Vol. II. p. 226; and Mr. Paley in his work on Conviction says, when the conviction is returned the case must be set down for argument on the Crown paper, &c.; and we find in several reported cases the case on a *concilium* argued to quash the conviction; but the proceeding to quash by motion, as in this case, is also adopted in numerous reported cases, and where the terms of the rule appear we find the convicting Justice called upon to shew cause as well as the complainant, &c. We refer to *Rex v. Walsh* (1 A. & E. 482;) *Regina v. Cridland*, (7 E. & B. 853.)

It is only just and reasonable that the Justice whose conviction is impeached and moved against should have an opportunity of supporting it if he so thinks proper, the step to quash in the majority of cases being taken with a view of bringing an action against the Justice.

In the case before us the conviction is sought to be quashed on grounds which, if true, shew gross improper conduct on the part of the Justice who made these convictions, and we are aware that a rule for a criminal information was granted during last term against the same Justice for acting corruptly in the matter. It would be most unreasonable that he should not be apprised of proceedings which are calculated to affect most materially his character, as well as any ulterior action to be instituted against him. Were we to hold that in such cases it was not necessary to make the convicting Justice a party, great injustice in many cases might result to magistrates.

As no authority was cited to support the view taken by the applicant's counsel, and as we find it is the practice in our own Courts as well as in England to make the Justice a party to a rule of this nature, and as there is an obvious reason why the practice should be so, we are of opinion that

the rule *nisi* must be discharged. It was said that it was not competent for the parties to the rule to object that the Justices were not parties, but, as said by Patteson, J., in *Rex v. Rattislaw* (5 Dowl. 542), the objection being brought under the notice of the Court, we are bound to deal with it.

Rule discharged, without costs.

IN RE MACKAY ET AL. V. GOODSON.

Division Court—Judgment summons—Commitment under—Effect of discharge under Insolvent Act—Deputy Clerk of the Crown—Privilege from arrest.

A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Act. If it did, a party applying for protection from arrest should shew clearly that the name of the plaintiff was in his schedule, and this is not sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there.

A Clerk of the County Court, being also *ex officio* Deputy Clerk of the Crown and Clerk of Assize, is privileged from arrest only while engaged in his official duties, or while going to and returning from his office; and this Court therefore discharged a rule to prohibit the County Court Judge from issuing an order of commitment against such officer.

DURING last Trinity Term, *Harrison Q. C.*, obtained a rule calling on the plaintiffs, and upon the Judge of the County Court of the County of Brant, to shew cause why a writ of prohibition should not be issued, directed to the said Judge, to restrain all further proceedings in the said Division Court under the order made by the said Judge for the arrest and imprisonment of the said Goodson, who is and was at the time of the making of the said order Deputy Clerk of the Crown and Pleas, Clerk of the County Court, and Clerk of Assize, in and for the County of Brant, on the following grounds: 1. That the said Goodson being such Deputy Clerk of the Crown, &c., is privileged from arrest. 2. That the said Goodson before the making of the said order for his arrest had obtained a discharge from his creditors under the Insolvent Act of 1864; and on grounds

disclosed in affidavits and papers filed in chambers; and why the order of Mr. Justice John Wilson discharging a summons herein for a prohibition with costs, should not be rescinded.

It appeared from the affidavits and papers filed, that the defendant was Clerk of the County Court holding his office under the Great Seal, &c. : that in December 1859 the plaintiffs recovered a judgment against the defendant for \$42 : that in May 1864 he was examined before the Judge, under section 160 of the Division Courts Act, and then ordered to pay \$5 a month to the plaintiffs, there being then due \$37.53. By the 19th September, 1864, the defendant had paid the plaintiffs \$16, but paid nothing since. On the 3rd April, 1866, defendant made an assignment of his estate to the official assignee for the County of Brant. He had been previously summoned by the Judge to appear before him on the 4th April, to shew cause why he should not be committed for not obeying the order to pay \$5 a month, and he then appeared and claimed that no further order could be made against him, and the matter stood over until the 28th April.

In the interim the defendant obtained the consent in writing of the requisite number of creditors, representing the requisite proportion in value required by the Insolvent Act of 1864, as he contended, to give validity to such consent to his discharge under the Act and his discharge from the debt in question. Notwithstanding such proceedings, on the 28th April the learned Judge in the Court below made an order in this cause directing the defendant to be committed for not paying the said money according to the terms of the order of May 1864, the Judge staying the issue of the order for twenty days to give the defendant time to pay the money or to take steps to relieve himself from the order.

The defendant then obtained a summons in the Court below on the 4th May, to rescind the order, on the ground that he had obtained a discharge under the insolvent Act, which summons was discharged, but the issue of the order for commitment was stayed to give the defendant an oppor-

tunity of applying for a writ of prohibition. And on the 3rd May a summons was obtained in Chambers for the issuing a writ of prohibition to restrain all further proceedings in the cause, on the ground that the defendant had obtained his discharge, &c., and on the ground of the defendant being Clerk of the County Court, &c., and as such being privileged from arrest.

That summons was discharged with costs, the learned Judge in Chambers being of opinion that the Judge of the County Court was right in refusing to rescind his order, upon the ground of the defendant not being discharged from the debt under the Insolvent Act. And as to the point of privilege from arrest, he was of opinion that, on the authority of the case of *Henderson v. Dickson* (19 U. C. R. 592) the defendant was not entitled to the privilege he claimed. *Mackay v. Goodson* (2 U. C. L. J. 210, N. S.)

During this term *Moss* shewed cause, citing *Abley v. Dale*, 11 C. B. 378; *Copeman v. Rose*, 7 E. & B. 679; *George v. Somers*, 11 Ex. 202; *Ex parte Christie*, 4 E. & B. 714; *Henderson v. Dickson*, 19 U. C. R. 592; *Ex parte Dakins*, 16 C. B. 77.

Harrison, Q. C., contra, cited, *Mackay v. Goodson*, 2 U. C. L. J. 210, N. S.; *Adams v. Ackland*, 7 U. C. R. 211; *Dyer v. Disney*, 16 M. & W. 312; *Ockford v. Freston*, 6 H. & N. 466; *Ex parte Foulkes*, 15 M. & W. 612; *Ex parte Kinning*, 4 C. B. 507; *George v. Somers*, 16 C. B. 538; *Thomson v. Harding*, 3 C. B. N. S. 254; *Wallinger v. Gurney*, 11 C. B. N. S. 182; *Markin v. Aldrich*, 11 C. B. N. S. 599; *The Queen v. Owen*, 15 Q. B. 476; *In re Boyce*, 2 E. & B. 521; *Naylor v. Mortimore*, 10 C. B. N. S. 566; *Basterfield v. Sprye*, 6 E. & B. 376; *Kinning's case*, 10 Q. B. 730; *Re Kinnaird*, 7 L. T. Rep. N. S. 25; *Re Willsmere*, 8 L. T. Rep. N. S. 853.

MORRISON, J. delivered the judgment of the Court.

It is much to be regretted that a question of privilege of this kind should arise.

The defendant holds office under the Great Seal as Clerk of the County Court of the County of Brant, the Court over which the learned Judge presides who is made a party to this rule. By Statute the defendant is also *ex officio* Deputy Clerk of the Crown, and as such an officer of this Court. He is also by Statute *ex officio* Clerk of Assize and Marshal. These are all offices entirely connected with and necessary to the administration of justice.

The defendant contends that by virtue of his discharge under the Insolvent Debtors Act of 1864, he is not liable to be committed upon a judgment summons, and that if he is liable he is privileged from arrest, holding the offices above mentioned.

As to the first point taken, we are of opinion that the decision of the learned Judge in Chambers was correct, and that a discharge under the Insolvent Debtors Act does not prevent a party being committed upon a judgment summons under the provision of the Division Courts Act. The cases of *Abley v. Dale*, (11 C. B. 378), and *George v. Somers*, (16 C. B. 539), are conclusive authorities on the point.

But if any doubt existed in that respect, we do not think that the defendant has shewn that the names of these plaintiffs were inserted in his schedule. Upon an application of this nature, it is the duty of the applicant to shew specifically that the creditor's debt appears in the schedule. Here the defendant only swears to a copy of the schedule attached to the affidavit, without stating the fact, and we are compelled to look over a great number of names to ascertain whether the plaintiffs' names are inserted. Upon an examination we cannot find any debt inserted as owing to the plaintiffs. We do find a debt as owing to one Duncan Mackay, probably one of the plaintiffs and intended for the debt claimed in the cause, but we cannot say so.

As to the second point, it is laid down in all the books of practice and in the various abridgments and other old authorities, in general terms, under the title of Privileges,

that officers of the Court are privileged from arrest, but we can find no decision in the English Courts exactly in point to guide us in a case like the present, and we have to deduce from those authorities by their uniting under one head the ordinary officers of the Court with barristers and attorneys, and from the principles and reasons assigned for the privilege of the latter class, that officers like the defendant employed in and about the business of the Courts have certain privileges, and among others that of exemption from arrest for debt, under particular circumstances. But although we have been unable to find any English precedent precisely in point, we find in the Courts in Ireland that applications of this nature have been frequently made, and that in recent times, and by persons holding offices analogous to those held by this defendant; and in our opinion the practice and law is there well settled, after full argument of the cases and a review of all the English authorities.

The result of these decisions is unfavorable to this application, and we may here remark that it is evident for obvious reasons that the Courts do not favor this species of privilege, and unless compelled by precedent would not give effect to it, and consequently they confine the privilege to the narrowest limits.

In the Irish cases the actual arrest of the officers took place, and we gather from these decisions that officers of the Court are privileged from arrest for debt while in the performance of their duties and while on their way to their offices or Courts, and also while returning to their homes; but beyond this the privilege ceases.

In *Bryan v. Carthew*, (1 Hudson and Brooke 37), the defendant was a secondary of the Court, and was arrested in execution on his way home. There the Court decided, on the authority of the cases cited, that under such circumstances he should be discharged. During the argument the plaintiffs' counsel pressed that if an officer could not be taken in execution, the public would be left without remedy against the officer; but Pennefather, B., said "That

objection might hold if the Court were to put this construction on the rule, that the officer was *at all times* privileged, but our decision, if in favor of the officer in this case, would not go that length. And O'Grady, C. B., in giving judgment said: "We have considered this case, and the decision of the Court is, that the defendant is entitled to his discharge. The majority of the Court act entirely on the precedents which have been brought before us. I do not wish, for my part, that the same kind of matter should come before me again, for I confess I am strongly inclined to give a different opinion."

And in *In re*——(3 Ir. Law Rep. 301), which was also the case of a clerk in one of the offices of the Court, who was also arrested, the only question was whether when arrested he was *bonâ fide* on his way home from Court. The decision was adverse. Burton, J., said: "The Court is of opinion that the petitioner has not acted in such a manner as to entitle him to the privilege which he claims. There can be no doubt that an officer of the Court as such is privileged in the course of his business at Court, and while going to and returning from his office, with the view of preventing the public business of the Court from being impeded." And Crampton, J., said: "We are bound to take care that the privilege is not made a cloak to avoid payment of the just debts of the party who claims it."

And in *Magrath v. Cooper* (10 Ir. Law Rep. 332), the defendant was Clerk of the writs, appearances, and seal of the Court. He was arrested at his own house, as he alleged, by fraud in being called to the door to see one of his clerks, when two men rushed into the parlor and arrested him on an execution. Blackburn, C. J., in giving judgment says: "The defendant insists that as an officer of the Court he has a general unqualified privilege from being arrested on final process. On such process, generally speaking, every subject is liable to arrest, and where there is a claim of exemption the right must be distinctly established. The privilege of attorneys from arrest is well established, but it has its limitation, founded on or defined by the duties they

have to perform. Are officers of the Court entitled to a larger privilege? I think not; and as the defendant was not arrested when engaged in his official duties, nor on his way to or from his office, but in his own house, he was not in a condition to claim exemption from arrest;" and the rule was discharged.

Such being the law and practice adopted after full consideration by very able Judges, we are bound to follow these decisions.

The present rule is to prohibit the learned Judge from issuing an order of commitment. It is quite clear that it is a matter within his jurisdiction, and the making or issuing of such an order is in no way affected by the question of privilege. The execution of the order may be, and that depends entirely upon the time and circumstances under which it is enforced. We cannot therefore restrain the issuing of the order because it is possible that the bailiff might act upon it at a time when the defendant is privileged from arrest.

Upon the whole case, we are of opinion that the rule must be discharged, for the reasons stated in *Magrath v. Cooper*, and with costs (a).

Rule discharged.

(a) It is there said "As the motion has been refused on the same ground as it was argued before Judge Crampton, it must be refused with costs.

ROSE V. CUYLER.

Evidence—Forgery—Declaration of subscribing witness—Admissibility of memorial.

The execution of a release of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. The demandant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left the country because he had forged the demandant's name.

Held, following *Stobart v. Dryden*, 1 M. & W. 615, that such evidence was rightly rejected.

Semble, that the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the *res gestæ*, and as shewing that P. had sworn to the execution; but if irrelevant and inadmissible, the other evidence well warranted the verdict for the defendant; and *Held*, therefore, that its admission was immaterial.

DOWER. Plea. Release by deed of the 25th August 1854, executed by the demandant and her former husband, Stephen Page, to one Whittemore, through whom the defendant claimed.

At the trial, at Toronto, before Adam Wilson, J., the defendant put in the deed containing the release. The subscribing witness, Sayles D. Pearce, was proved to have been dead ten years, and his brother proved his handwriting. He died in the United States.

The Registrar produced a memorial, dated 26th August, 1854, purporting to be of this deed. The witnesses were Sayles D. Pearce and James Graham, and the registration was made on the affidavit of Sayles D. Pearce, and his handwriting to the affidavit was proved.

It was objected by the plaintiff that this evidence was inadmissible, that the memorial and affidavit were irrelevant to the issue.

A great deal of evidence was given on both sides, demandant contending that she could not write, and that Sayles had forged her signature. The defendant, on the contrary, proving many facts against that supposition. Demandant called a witness to prove that Pearce had told him he had left Canada because he had forged her name. This evidence was rejected, on objection taken.

The jury found for the defendant.

Harrison, Q. C., obtained a rule for a new trial, on the law and evidence and weight of evidence, and for the admission of the memorial and affidavit, and the rejection of Pearce's declaration as to the forgery. He cited *Stobart v. Dryden*, 1 M. & W. 615; *Sussex Peerage case*, 11 Cl. & F. 85.

S. Richards, Q. C., shewed cause, citing *Horford v. Wilson*, 1 Taunt. 12; *Doe dem. Lord Teynham v. Tyler*, 6 Bing. 561; *Rogers v. Munns*, 25 U. C. R. 153; *Nathan v. Buckland*, 2 Moore 153.

HAGARTY, J., delivered the judgment of the Court.

We think the evidence as to Pearce declaring he had forged the demandant's name was rightly rejected.

Stobart v. Dryden (1 M. & W. 615), is expressly in point. A similar declaration by a deceased witness was rejected, after a careful review of the law, by Parke, B. See also *Tay. Ev.* sec. 509, where the case is noticed, and *The Sussex Peerage case* (11 Cl. & F. 103), and *Taylor's* comments, sec. 604.

We need not discuss the weight of evidence, as we think the verdict cannot be questioned on that ground.

As to the reception of the memorial and affidavit. It is insisted for the defendant that the affidavit, though produced and proved, was not read to the Court or jury.

If this be so, (and we did not understand it to be denied in the argument), it lessens the main objection. The issue was, did the demandant sign the deed or not? On its production her name appears duly to it, and one witness only (S. B. Pearce,) appears. On proof of his handwriting a *primâ facie* case is made out. Then it is sought to shew that the witness forged her name.

The deed bears on it the proof that it has been registered. The law of the land is that this registration could only have been effected on the affidavit of Pearce, the witness. We do not think it would be improper for either the counsel or the Court in addressing the jury to notice that, as a fact about which there could be no reasonable dispute. It

would not perhaps have been necessary that Pearce should have done more than have sworn to the execution by the husband, the grantor, omitting any mention of the demandant having signed. It would be competent, had he done so, we think, for her to have proved and called attention to that fact, which would not have been without significance in her favor.

But if he made the ordinary proof of execution by both the parties, we hardly see how it would be proper to exclude all mention of this, treating it as the natural completion of the one transaction: viz. the sale by Page and his wife of the land to Whittemore, and the usual registration of the deed, without which act the conveyance would be easily rendered unavailing and the estate possibly be lost. In this sense it would not be stretching the *res gestæ* doctrine unfairly, to consider the contemporaneous act of registration as falling within its scope.

Were the matter unaffected by decision or authority, and we were trying the question whether a deed was or was not executed, as it professes to be, in presence of a man not here to testify for himself, it is not easy to see on what principle of common sense a jury should be prevented from knowing the fact that the man who certainly put his name to the deed as witness did at the same time, for the completion of the transaction, go before the proper authority and swear to the fact, thus adding perjury to forgery if the attestation was untrue.

But in a case like the present it is not absolutely necessary to decide the case expressly on this point.

No doctrine is clearer than that the irregular admission of a fact collateral to the issue, as this is asserted to be, does not necessarily vitiate a verdict well supported by unimpeachably regular testimony.

On this point see *Dundas v. Johnston* (24 U. C. R. 551), where this doctrine is upheld. A tenant in ejectment was admitted as a witness for the defendant, his landlord, and the Court, although considering him inadmissible, refused a new trial on the plaintiff's application. The authorities are there cited.

In every view this verdict for the tenant appears well warranted by the evidence, and we should be most reluctant to set it aside, unless we were satisfied that we were bound in law so to do.

We think the rule should be discharged.

Rule discharged.

FITCH V. LEMMON.

Libel—Justification—Pleading.

Part of a libel complained of was that the plaintiff had narrowly escaped being indicted for perjury. As to this part defendant justified, alleging that in a certain suit the plaintiff, as plaintiff's attorney therein, in an affidavit for a *Ca. Sa* had sworn falsely to certain specified statements made to him by one R.: that defendant in that suit had recovered damages against the plaintiff for falsely and maliciously making such affidavit, and contemplated a prosecution of the plaintiff for perjury, but was dissuaded. *Held*, a good plea.

In the second count, the libel alleged was in part the publication of an affidavit made by R., in which he set out the action against the plaintiff, and the statements sworn by plaintiff to have been made to him by R., and averred that on the trial of that action he, R., had sworn that these statements were false, as in fact they were. Defendant in a plea to this part of the libel, averred that these statements made by R., repeating them, were true. *Held* sufficient.

In a third count the libel was that the plaintiff, a practising barrister and attorney, was a pettifogger and without character. This defendant justified, by setting out one matter (the suit mentioned in the other pleas) in which the plaintiff was alleged to have acted as charged in the libel. *Held*, bad, for the general charge could not be justified by a single instance.

LIBEL—First count. That the plaintiff is a barrister and attorney, and defendant published in a newspaper a libel charging him with circulating lies, &c., and that he had narrowly escaped being indicted for perjury in a certain case at Woodstock—innuendo, that the plaintiff had in certain judicial proceedings at Woodstock wilfully and corruptly sworn to what was false, and had narrowly escaped being indicted for perjury therefor, and was addicted to falsehood, and had been circulating lies.

The second count set out verbatim a libel published in defendant's newspaper, in effect warning the plaintiff to cease circulating malicious falsehoods about a third person named—threatening to publish the whole proceedings in a certain suit of Campbell against the plaintiff, and giving in full an affidavit made by Andrew Ross, stating, 2—that an action had been brought against the now plaintiff, by Campbell as the plaintiff, for maliciously making a false affidavit by which the plaintiff had procured an order for a *Ca.Sa.*, at the suit of the Bank of Montreal, as their attorney, against Campbell, in which Campbell was held to bail: 3—That in that affidavit the plaintiff had sworn to certain statements which he said Ross had made to him, as to Campbell making a bill of sale to one Haight: 4—That he, Ross, was a witness at the trial, and swore, as he repeated in this affidavit, that this was false: 5—That from what he knew of the plaintiff in that and other matters, he would not believe him on oath or otherwise—innuendo, that defendant thereby intended to impute wilful misconduct to the plaintiff professionally, and that he had wilfully and corruptly sworn to what was false, and was an untruthful person, not to be believed on oath.

The third count was for another libel on the plaintiff, professionally, in defendant's newspaper, headed "A pettifogger in print"—alluding to the plaintiff and some threats on the part of the latter to bring an action against the defendant and Ross, referring to his want of character, and again speaking of the case of Campbell v. Fitch, and the "affidavit-making propensities" of the plaintiff; alleging defendant's willingness that he might try the little game of touching defendant's pocket, if he thought he could make anything thereby; that perhaps that was a method he had of manufacturing cases, and if so, defendant had no objection to become defendant in any action he might bring—innuendo, that defendant thereby intended to represent that the plaintiff was a pettifogger, or a petty and small lawyer, practising in a mean and dishonourable manner, and promoting cases for improper purposes, and with im-

proper objects, and that the plaintiff was a man of bad character.

Second Plea. As to so much of the said alleged libel in the first count contained as states that the plaintiff narrowly escaped being indicted for perjury in a certain case in Woodstock, the defendant says that there was a judgment recorded in the Court of Queen's Bench by the Bank of Montreal against one Josiah Campbell, for \$1458.90: that in order to procure the issue of a writ of *Ca. Sa.*, for the arrest of the said J. C., the said plaintiff, acting as attorney for the Bank of Montreal, made an affidavit in the said cause, in which he swore that the Sheriff of the County of Oxford had informed him that a few days previous to the 26th of April, 1865, the said J. C., had made and executed a bill of sale of his chattels to one George Haight: that the said statement was false, and without any foundation whatever: that an order having been made for the issue of a writ of *Ca. Sa.* on the said affidavit, and on other affidavits made by the said plaintiffs in the said cause of the Bank of Montreal against the said Campbell, said writ having been issued thereon, and the said J. C. having been thereunder arrested, he, the said J. C., made application to set aside said writ, and was successful, and afterwards prosecuted an action against the now plaintiff in the Court of C. P., for having falsely and maliciously, and without any reasonable or probable cause, made a false and malicious affidavit by which the process aforesaid was issued, and the said Campbell arrested; and such proceedings were had in the said action last mentioned, that the same was tried at Woodstock aforesaid, and a verdict rendered against the now plaintiff for \$175, which afterwards passed into judgment, and said Campbell, at Woodstock aforesaid, on the occasion of the last mentioned trial, contemplated and was about instituting a prosecution against the now plaintiff for perjury, but was dissuaded therefrom. And so the defendant says so much of the alleged libel as is in the introductory part of this plea mentioned was and is true.

Third Plea, to so much of the said second count as is

contained in the second, third, and fourth paragraphs of the said affidavit in said count set out, and the causes of action in respect thereof. It set out the judgment recovered by the Bank of Montreal against Campbell, the affidavit made by the plaintiff, the order for Campbell's arrest made thereon, the issue of the *Ca. Sa.*, and his arrest, and the action brought by Campbell against the plaintiff. It was then alleged that the said statements in the said affidavit in this plea mentioned are the same affidavit and statement in the third paragraph of the affidavit of the said Ross, in the said second count mentioned, and the said cause in the said affidavit is the same cause in this plea mentioned : that the said cause was tried at the Assizes in and for the County of Oxford, in the month of October, in the year 1865 : that the said Sheriff was examined, and swore and gave evidence on the said trial, and then testified as is stated in the affidavit in the said second count mentioned, and as the fact then was and is, that the said statements so made were utterly false, and without any foundation whatever. And so the defendant says, that the several matters and things in the second, third, and fourth paragraphs of the affidavit in the said count mentioned, and all of which happened before the making of the said affidavit, are true in substance and in fact.

Fifth Plea. To so much of the alleged libel in the third count contained as states that the plaintiff is a pettifogger, and without character :—that in order to promote litigation and to harass a person, named Josiah Campbell, against whom the plaintiff, as attorney for the Bank of Montreal, recovered a judgment, he, the said plaintiff, wickedly and wantonly made the affidavit in the last plea mentioned, in which he swore that the Sheriff of the County of Oxford had informed him that a few days previous to the 26th of April, 1865, the said J. C. had made and executed a bill of sale of his chattels to one George Hague, which statement was false and without any foundation whatever ; and yet the said now plaintiff, acting as attorney for the said plaintiffs, the Bank of Montreal, wickedly and wantonly, and corruptly

procured an order for a writ of *Ca. Sa.* to be issued on the said and other affidavits made by the plaintiffs in the said cause, and had the said J. C. thereunder arrested. And so the defendant says, that the matters and things in the introductory part of this plea pleaded to are true in substance and in fact.

Demurrer, to each of these pleas.

Read, Q. C., and *Boyd*, for the demurrers, cited *Mountney v. Walton*, 2 B. & Ad. 673; *Holmes v. Catesby*, 1 Taunt. 543; *Cooper v. Lawson*, 8 A. & E. 746; *Bishop v. Latimer*, 4 L. T. Rep. N. S. 775; *Clarke v. Taylor*, 2 Bing. N. C. 654; *Revis v. Smith*, 18 C. B. 126; *Helsham v. Blackwood*, 11 C. B. 111; *Gibb v. Shaw*, 18 U. C. R. 165; *Stile v. Nokes*, 7 East 492; *J'Anson v. Stuart*, 2 Sm. L. C. 57; Consol. Stat. U. C. ch. 103, sec. 9; *Cory v. Bond*, 2 F. & F. 241.

Harrison, Q. C., contra, cited *McGregor v. Gregory*, 11 M. & W. 287; *Hankinson v. Bilby*, 16 M. & W. 442, *Add.* T. 719.

HAGARTY, J., delivered the judgment of the Court.

As to the second plea, confined to justifying the statement that the plaintiff narrowly escaped being indicted for perjury, there are some objections of the most special kind, as to the want of allegations of the materiality of the statements in the plaintiff's affidavit, or that it was knowingly false: that the fact of Campbell contemplating, &c., a prosecution for perjury, &c., was no justification: that the formalities required in proceedings for perjury by Statute are not shewn to have been taken by Campbell, or that any indictment was prepared or could have been obtained.

It must be observed that the justification is confined to the mere assertion of plaintiff's narrow escape, and does not apparently undertake to shew that perjury was actually committed. It may be thus stated: "You made an affidavit to arrest Campbell, containing statements which were wholly false, (shewing the particular falsehood). On this

Campbell was arrested, and then sued you and recovered damages for falsely and maliciously making such affidavit, and then Campbell was going to have you indicted at that Assize, but was dissuaded ; so you narrowly escaped being indicted for perjury."

We are not prepared to hold that defendant may not be allowed to justify to this extent, and although it is not easy to reconcile all we find in the books as to the rule of such pleadings in libel and slander, we think this may be upheld. We know that a man may be indicted for perjury on a false charge, or on the trial the charge may break down on many grounds ; the statement may not be material, or the contradiction not sufficiently clear, &c. ; still he was actually indicted for perjury, though he did not in the eye of the law commit the offence. It is easy to conceive a case in which a perfectly innocent man might very narrowly escape being indicted for perjury.

If the plaintiff take issue on this justification, the defendant must, in order to succeed, prove it in substance as alleged, and satisfy the jury of its truth. If the plaintiff never was really in danger of so being indicted the justification would fail. It would hardly, we think, be proved by merely shewing that Campbell had threatened to indict or talked of indicting, &c. The whole facts of the matter would have to be inquired into.

We think the defendant should have judgment on the demurrer to this second plea.

The third plea, to the second count, is demurred to as offering no justification, and for some special causes as to the possible grounds other than the plaintiff's affidavit on which the order to arrest Campbell was obtained, or on what statement in the affidavit Campbell obtained a verdict, and because it is not averred that defendant published Ross's affidavit without malice, or on a justifiable occasion.

The plea justifies as to what is contained in the second, third, and fourth paragraphs of Ross's affidavit (which is the alleged libel,) that the statements in these paragraphs

are true, and proceeds to aver specifically the truth of each.

We are of opinion that the justification covers all to which it is pleaded. Every statement in the paragraph is gone over and circumstantially averred to be true, and to have occurred as Ross has sworn to them.

We think our judgment must be for defendant on demurrer to this plea.

As to the fifth plea, to the third count, we think it is bad. It is pleaded to the statement that the plaintiff is a pettifogger, and without character, and as a justification sets out the Campbell suit, and that the plaintiff made the affidavit to promote litigation, and to harass Campbell; that it was false, corrupt, and wicked, &c.

The plaintiff places his own construction on the charge of pettifogging as applicable to his general practising as a lawyer meanly and dishonorably, and for improper purposes promoting cases, and he undertakes to satisfy a jury that such is the meaning of the charge.

The defendant justifies by narrating an isolated act of the plaintiff in Campbell's matter, not even averring, as was done in *Tighe v. Cooper* (7 E. & B. 639), that he had made the charge solely in reference to that particular matter.

It seems that when a charge of general bad conduct is made, it cannot usually be justified by a single instance; at least so we gather from *Wakley v. Healey* (4 Ex. 517), Parke, B. says: "I am perfectly satisfied that the words "libellous journalist" do not mean that the plaintiff has been guilty, upon one occasion only, of having merely published a libel, but that he has been guilty of gross misconduct as a journalist, by the habit of libelling others." Alderson, B., "If the words "libellous journalist" are to be taken in the declaration to mean a person habitually guilty of publishing libels, and in the plea as meaning a person who has been guilty upon one occasion only, the plea would be bad.

Besides, here the plea justifies both as to the word "pettifogger" and as to the statement of the plaintiff being a man without character.

As to the right of the plaintiff to assign any meaning he pleases in his innuendo, we refer to *Black v. Alcock* (12 C. P. 19), and to *Hemmings v. Gasson* (El. Bl. & El. 352.)

Judgment for the plaintiff on demurrer to fifth plea, and for the defendant on the other demurrers.

RUSSELL ET AL. V. WILKES.

Libel—Construction—Pleading.

Libel—The first count set out that the plaintiffs were watchmakers, and sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name of their firm only, adding on the other the words “Chronometer Makers to the Queen”. The libel complained of charged in substance that a large proportion of the watches advertised by them were merely Swiss watches imposed upon the public as English, and at twice their true value.

In the second count the libel alleged charged the plaintiffs with selling their watches made in Switzerland as English, and thus defrauding the public.

The defendants pleaded to each count that the plaintiffs marked their Swiss watches with the name “Thomas Russell and Sons, London and Liverpool,” not “Thomas Russell and Sons” only, as alleged.

Held, bad, as offering an immaterial issue.

Held, also, that each count shewed a good cause of action.

LIBEL First count. That the plaintiffs, being co-partners under the style and firm of Thomas Russell & Sons, before and at the time of the committing of the grievances hereinafter mentioned, were and still are watchmakers, and engaged in the business of selling watches in the Province, and had been duly and are duly authorized to use the name and designation of Chronometer makers to the Queen, and had been in the habit of lawfully using such name and designation, and had been and are known to persons engaged in the trade of buying and selling watches and to all the public by such name and designation. And the plaintiffs further say, that before and at the time aforesaid they had been and still are accustomed to sell certain watches

of a certain quality and description, which are known to persons engaged in the trade aforesaid as Swiss watches and Swiss ancrés, the same being made and manufactured for the plaintiffs in the Republic of Switzerland, and also certain other watches of a different kind, and of superior quality and description, and of greater value, which last mentioned watches are made and manufactured in England; and that the plaintiffs have always marked and still mark the said Swiss watches with the name of their said firm, to wit, "Thomas Russell and Sons," and not with the said name and designation of "Chronometer makers to the Queen," but have only used the said last mentioned name and designation to mark and distinguish the said watches so manufactured in England as aforesaid.

Yet the defendant, well knowing the premises, falsely and maliciously printed and published in divers public newspapers in this Province, of and concerning the plaintiffs and of and concerning them in their said trade and business, the words following, that is to say: "The American Watch Company takes pleasure in calling the attention of the Canadian public to the steadily growing reputation for accuracy and reliability among the Canadian people of the American Watch. Interested parties availed themselves for a time of a not unnatural prejudice against the watches, but this has had its day. Now the watches stand fairly before the public on their merits, and in every instance where tried they have been found infinitely superior to the uncertain, cheap Swiss or Coventry hand-made watches, with which the market has so long been flooded, under fictitious names and reputations. In proof of this may be pointed out certain watches, (meaning watches of the plaintiffs), which are largely advertised throughout the Dominion under the attractive caption of 'Chronometer makers to the Queen,' (meaning that the said watches are advertised by the plaintiffs). A large proportion of said advertised watches are merely Swiss ancrés imposed upon the public by an appeal to their loyalty as genuine London watches, at more than twice or thrice their true value, (meaning that the plaintiffs

impose upon the public their said watches so made and manufactured in Switzerland as aforesaid as and for their said watches so made and manufactured in England as aforesaid, and thereby obtain for their said Swiss watches twice or thrice their real value.) By such means the public cannot long be deceived, (meaning that the plaintiffs have been and are deceiving the public." By means whereof the plaintiffs have been and are greatly injured in their good name and credit, and in their said trade and business, and have lost and been deprived of great gains, profits and emoluments, which they might and otherwise would have derived from the sale of their said watches.

The second count, after a similar inducement, alleged the publication by the defendant of the following: "Caution! The excellent reputation of the celebrated American Watch has induced certain unprincipled dealers, some of whom we could name, to place upon the Canadian market a worthless Swiss counterfeit of our watches, having our trade marks in whole or in part, (meaning that the plaintiffs are unprincipled dealers, and that they sell worthless and counterfeit watches). All purchasers of the American Watch should insist on our printed certificate of genuineness. Swiss aneres, whether sold as the manufacture of Chronometer makers to the Queen, or as genuine American made watches at far more than their value, are a fraud upon the public, which deserves to be exposed, (meaning that the plaintiffs in selling their said watches so made and manufactured in Switzerland as aforesaid are committing a fraud upon the public, and that the plaintiffs sell watches which are a fraud upon the public.) By means whereof," &c.

To each count defendant pleaded, that the plaintiffs have marked the said Swiss watches in the count mentioned with the names "Thomas Russell & Sons, London and Liverpool," and not with the names "Thomas Russell & Sons" only, as alleged.

These pleas were demurred to as offering no issuable traverse, and as immaterial, and no answers to the action. The defendant joined in demurrer, and excepted to the declaration.

Moss, for the plaintiffs, cited Consol. Stat. U. C. ch. 103, sec. 2; *Hemmings v. Gasson*, 1 E. B. & E. 346; *Evans v. Harlow*, 5 Q. B. 624; *Babonneau v. Farrell*, 15 C. B. 360; *Young v. Macrae*, 7 L. T. Rep. N. S. 354; *Thomas v. Jackson*, 3 Bing. 104.

McMichael, contra.

HAGARTY, J., delivered the judgment of the Court.

We do not understand the object of these pleas. There is no direct allegation, even if material, in the counts of which this could be a traverse. The averment in the first count is that the plaintiffs mark the Swiss watches with the name of their firm, saying nothing about its locality in London and Liverpool, and only put "Chronometer makers to the Queen," on the English-made watches.

The finding of an issue on these pleas one way or the other would not, we think, affect the case, much less decide it, and it appears to be a wholly collateral and immaterial allegation. We think both pleas bad.

The defendant has demurred to each count.

The chief objection seems to us to be, besides the general one that no cause of action is shewn, that it is not shewn that the public are enabled in any way to distinguish, or that the plaintiffs have by their advertisements distinguished between the different kind of watches made by the plaintiff as alleged, nor pointed out any way by which the public can distinguish that the watches marked Thomas Russell & Sons were made in Switzerland and not in England.

We think the defendant mistakes the gist of the alleged libel. In the first count it is that the plaintiffs impose inferior Swiss ancrs on the public as genuine London watches.

As we have had occasion to notice more fully in *Fitch v. Lemmon*, (a), the plaintiffs undertake to satisfy the jury of the correctness of the meaning they put upon the alleged

(a) *Ante*, page 273.

libel. In this view the defendant's objections fail as matters of pleading.

Nor do we think that the objection can affect the second count, for the like reasons.

Both counts, with the innuendoes, seem to disclose a cause of action.

Judgment for plaintiffs.

COATES v. KELTY ET AL.

Note payable to bearer—Proof of plaintiff being the holder—Evidence—Answer in Chancery.

Defendant made a note payable to T. or bearer, who died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife to recover the assets. A bill was filed by defendants to restrain this action, and in his answer the plaintiff swore that, in consequence of the difficulties with the administrator, he had returned the note to G. before this action; that he had had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit, and the plaintiff had recognized it, saying that he was indemnified by G. The jury having found for the plaintiff on a plea denying that he was the lawful holder, a new trial was refused in the County Court.

- Held*, 1. Affirming the judgment below, that the plaintiff's answer in Chancery, though very strong evidence, was not conclusive.
2. Reversing such judgment, that admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the person on whose immediate behalf the action was brought.
 3. That upon the evidence the plaintiff should have been found to be the holder. *Ancona v. Marks*, 7 H. & N. 686, distinguished.

APPEAL from the County Court of York.

Declaration on a promissory note made by defendants payable to Simon Tiels or bearer, and that the plaintiff became the bearer. The plea chiefly to be considered was the first—that the plaintiff was not at the commencement of the suit the lawful holder.

It appeared that the payee had died before the note matured, and his widow married one Potter. As defendants

alleged, Potter and his wife, or either of them, sold this note to one Graham, for value. While it was current Graham endorsed and transferred it to the plaintiff, who advanced \$200 to him on it, or purchased it from him. The note matured in May, 1867. Administration was granted of Tiel's estate to one Deal, who took proceedings against Potter and his wife to recover the estate. This action was commenced on the 6th July, 1867.

Defendants filed a bill in Chancery against the plaintiff and Graham, and the Potters, to restrain the action, and the plaintiff's answer on oath was read at the trial. He stated that, in consequence of the difficulties with the administrator, in June he gave back the note to Graham, taking security for the amount he had paid him, and lending him another sum of money; and that he then ceased to have any interest in the note. In the most emphatic language he asserted that he had never authorized his name to be used, and that he knew nothing of the action; and that he had no interest whatever in the note or its proceeds since he had given it back to Graham in June. This was in November. The learned Judge rejected evidence of admissions by Graham.

To meet this evidence, Mr. Boulton, attorney on the record, was called. He said, "I received instructions from Graham. I have seen the plaintiff more than once. Coates recognized the suit, and said he was indemnified by Graham. The note was handed to me by Graham. The proceeds of this are to go to Coates. These were my instructions from both of them."

The learned Judge told the jury that they were to consider whether or not the plaintiff was the holder of the note: that the answer filed in Chancery was very strong evidence that the plaintiff was not the holder: that the evidence given by the plaintiff to contradict it was that of Boulton, stating that Coates recognized the suit, and that the proceeds were to go to the plaintiff.

Defendants' counsel objected that he should have told the jury that the first plea was proved, because the plain-

tiff was not in possession, and that the oath in Chancery of the plaintiff was conclusive.

The jury found for the plaintiff.

Next term a new trial was moved for on these points, and on the evidence, and for misdirection and want of direction, and the rejection of Graham's admissions. After argument this rule was discharged, and defendants appealed.

J. A. Boyd, for the appellants, cited, as to the admissibility of Graham's admissions, *Arkle v. Wakeman*, 1 C. & K. 516; *Spargo v. Brown*, 9 B. & C. 935; *Ross v. Commercial Union Assurance Co.*, 26 U. C. R. 559; as to the right of the plaintiff to sue as holder, *Emmett v. Tottenham*, 8 Ex. 884; *Ancona v. Marks*, 7 H. & N. 686; *Dugan et al. v. The United States*, 3 Wheat. 172.

McMichael, contra.

HAGARTY, J., delivered the judgment of the Court.

We do not agree with Mr. Boyd that the answer in Chancery was conclusive on the plaintiff. It was very strong evidence, but it is open to explanation, and no estoppel. See *Taylor on Evidence*, sec. 784. We think this ground fails.

But it seems to us that the learned Judge was wrong in rejecting the admissions of Graham, who on the evidence, and especially on the clear and explicit statement on oath of the plaintiff, was undoubtedly a person on whose immediate behalf the action is brought, or, in the language of the older cases, "identified in interest with the plaintiff."

On this ground alone we should feel bound to allow the appeal.

But we think the issue on the first plea has not been properly dealt with. If we hold that the evidence here legally entitled the plaintiff to succeed on that plea, we can hardly conceive any case in which the plea could avail.

The latest case that we have is *Ancona v. Marks*, (7 H. & N. 686), and it seems to have gone the furthest in the plaintiff's favour. The defendant had given the notes to one Wright, who discounted them. Wright went to

Tucker, of a firm of Greville & Tucker, who had sometimes acted as his agents. He asked Tucker to find a client who would lend his name in an action. Tucker said there was no difficulty, as he had the authority of the plaintiff, Ancona. Wright then said, "I wish you to receive these bills for Ancona, and sue them in his name," and endorsed and gave them to Tucker. Wright had done the same on a previous occasion with Tucker. Tucker said at the trial he had a general authority from Ancona to use his name for such purposes, and he had the notes in his possession when the writ was sued out. The plaintiff stated that Tucker had used his name before; he had no knowledge that his name was used in this action until after action brought, but when he was told of it he was willing it should go on. The jury were told by Martin B. that if they believed that on a day anterior to the action Wright, the owner of the securities, gave them to Tucker, who received them as and for the plaintiff, and to sue upon them in his name, and that the plaintiff subsequently assented to his name being used, and ratified the proceedings, then such ratification related back to the time of delivery to Tucker, as if the plaintiff had then stood by and given authority to sue in his name.

The case was very fully argued. Channell, B., says, "It is not necessary that the plaintiff should be the actual holder; it is sufficient if he has an interest in them coupled with possession either actual or constructive. There is no pretence for saying that at the time the action was brought he had any knowledge that his name was used; therefore, the question is, whether there was any evidence that he was the holder of the securities at that time. * * Did Greville & Tucker receive the securities for the plaintiff? Unquestionably they did."

Wilde, B., after stating the facts, says, "The mere consent by a person that a bill may be sued upon in his name will not make him the holder of it. There must be something more—he must have some sort of possession." Then as to ratification he cites *Wilson v. Tumman*, (6

M. & G. 236), "An act done *for another*, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. * * The subsequent ratification by the plaintiff of the act done by Greville and Tucker for him, places them in the same position as if he had given his previous assent, and makes the act done by them as his agents the same as if he had done it himself."

It seems clear to us that in that case the subsequent assent of Ancona to allow his name to be used would not have availed but for the previous transfer of the bill to Greville & Tucker to be sued in the plaintiff's name, and their professing to accept it for him and for that purpose.

This case was in 1862. The earlier cases are much stronger against the plaintiff. *Emmett v. Tottenham*, (8 Ex. 884) is very strong. See also *Law v. Parnell* (7 C. B. N. S. 285).

It is possible that Mr. Boulton, if examined more fully, might state the facts so as to shew the true position of the parties when the suit commenced, and the question can be submitted to a jury on the legal principles laid down in *Ancona v. Marks*.

It is difficult to see how the jury accepted the very meagre evidence offered to them in opposition to the emphatic statement of the plaintiff on oath.

We allow the appeal, and direct that the rule for a new trial in the Court below be made absolute without costs.

Appeal allowed.

REID V. McWHINNIE AND MARTIN.

Selling liquors without license—Form of conviction and warrant of distress—Pleading.

On demurrer to an avowry justifying under a conviction for selling spirituous liquors without license, and a distress warrant issued thereon—

Held, 1. That it was sufficient to state the offence in the conviction as selling “a certain spirituous liquor called whisky,” though the clause, (29-30 Vic., ch. 51, sec. 254) creating the offence says “intoxicating liquor of any kind”; for intoxicating liquors and spirituous liquors are used in the Act as convertible terms; and in the Customs Act of the same session whisky is recognised as a spirituous liquor.

2. No objection that the proceedings were not stated to have been begun within twenty days from the offence, for the fact appeared on the face of the conviction.

3. The offence alleged was selling “a certain quantity, to wit, one pint.” **Held**, sufficient, without negating that it was a sale in the original packages, within the exemption in sec. 252, for it would be judicially noticed that a pint was less than five gallons or twelve bottles, which such packages must at least contain.

4. No objection that the costs of conveying the defendants to gaol, in the event of imprisonment in default of distress, were specified.

As to the other objections suggested, it was held a sufficient answer that the conviction followed the form prescribed by the Act, Consol. Stat. C. chap. 103, which were intended as a guide to magistrates and to prevent failure of justice from trivial objections.

As to the form of the warrant, **Held** unnecessary to allege that it was under seal, or that it was directed to any one, it being averred to have been duly issued and delivered for execution to defendant M., the constable.

Held, also, that the avowry, set out below, sufficiently shewed that defendant M. was a constable, and that it was delivered to him for execution.

Held, also, that the mention in the warrant of the \$1 for costs of conveying defendants to gaol could not vitiate, for it authorized a distress only for the penalty and costs of conviction.

APPEAL from the County Court of Oxford.

REPLEVIN. Avowry and cognizance, that the goods in the declaration mentioned were taken and detained under a warrant of distress duly issued by the said defendant John McWhinnie, as and being a Justice of the Peace in and for the County of Oxford, for non-payment of penalty and costs adjudged to be paid by the said plaintiff under the terms and provisions of a certain conviction duly made on, to wit, the 30th day of April now last past, and in the words and figures following:

PROVINCE OF CANADA, } Be it remembered that on the
County of Oxford. } thirtieth day of April, in the year
of our Lord one thousand eight hundred and sixty-seven,
in the Town of Woodstock, in the said County of Oxford,
William A. Reid is convicted before the undersigned, two
of Her Majesty's Justices of the Peace for the County of
Oxford, for that he, the said William A. Reid, at the said
Town of Woodstock, on the twelfth day of April, in the
year of our Lord one thousand eight hundred and sixty-
seven, did sell to one Henry Chapman a certain quantity,
to wit, one pint, of a certain spirituous liquor called whis-
ky, he, the said William A. Reid, not then being licensed
by any competent authority in that behalf to sell any spi-
rituous liquor; against the form of the Statute in such case
made and provided. And we adjudge the said William A.
Reid, for his said offence, to forfeit and pay the sum of
twenty dollars, to be paid and applied according to law,
and also to pay to the informant, John Brian, the sum of
four dollars and twenty cents for his costs in this behalf.
And if the said several sums be not paid forthwith on or
before the tenth day of May next, we order that the same
be levied by distress and sale of the goods and chattels of
the said William A. Reid, and in default of sufficient dis-
tress we adjudge the said William A. Reid to be imprisoned
in the common gaol of the said County of Oxford, at Wood-
stock, in the said County of Oxford, for the space of fifteen
days, unless the said several sums, and all costs and charges
of the said distress, and the costs and charges of conveying
the said William A. Reid to the said common gaol, to wit,
the sum of one dollar, shall be sooner paid.

Given under our hands and seals the day and year first
above mentioned, at the Town of Woodstock, in the County
of Oxford aforesaid.

(Signed),

WILLIAM GREY, J. P. (*Seal.*)

JOHN McWHINNIE, J. P. (*Seal.*)

And of which said offence the plaintiff was convicted by
the said John McWhinnie and William Grey, Esquires, two
of Her Majesty's Justices of the Peace in and for the said
County of Oxford, and which said conviction yet remains in
full force and effect. And because the said plaintiff made
default in paying the said penalty and costs so adjudged to be
paid, and the same were unpaid at the time when, &c., the

said warrant of distress was issued as aforesaid, and was delivered for execution to the said defendant Richard Martin. And the defendant John McWhinnie well avows, and the said defendant Richard Martin, as and being a constable of and in the said County of Oxford, and as being the Bailiff of the said John McWhinnie, well acknowledges, the taking and detention of the said goods under the said warrant and conviction, and justly, &c., as a distress for the penalty and costs so adjudged to be paid by the said plaintiff, which still remain unpaid, wherefore the defendants pray judgment, and a return of the said goods and chattels.

The plaintiff demurred to this avowry, and judgment having been given in his favor on such demurrer in the Court below, the defendants appealed. The grounds of demurrer are sufficiently stated in the judgment of this Court.

J. A. Boyd, for the appellants, cited *Wray v. Toke*, 12 Q. B. 492; *Hawk*, P. C. Vol. II., ch 37, sec. 27; *Rex v. Symonds*, 1 East 189; *Re George Bailey*, 3 E. & B. 607; *Skingley v. Surridge*, 11 M. & W. 503; *Rex v. Chandler*, 1 Salk. 378; *Regina v. Faulkner*, 26 U. C. R. 529; *Clarke v. Carrall*, 17 C. P. 538

Harrison, Q. C., contra, cited *Fletcher v. Calthrop*, 6 Q. B. 880; *Howard v. Gossett*, 10 Q. B. 359; *Lindsay v. Leigh*, 11 Q. B. 455; *Re Turner*, 9 Q. B. 90; *Attorney General v. Bailey*, 1 Ex. 281, 292; *Paley on Convictions*, 193, 195; *Rex v. Ferguson*, 3 O. S. 220; *Chaddock v. Wilbraham*, 5 C. B. 645; *Moore v. Jarron*, 9 U. C. R. 233; *Phillips v. Whitsed*, 2 E. & E. 804; *Rex v. Dove*, 3 B. & Al. 596; *Kerford v. Mondel*, 28 L. J. Ex. 303.

MORRISON, J., delivered the judgment of the Court.

The two material points which arise on the pleadings are whether the conviction set out is a valid one, and whether the warrant and delivery, &c., of it to defendant Martin, is properly pleaded, and justifies the taking of the goods.

Various objections were taken to the conviction; among others, that it did not shew any offence committed by the

plaintiff: that the Statute under which the plaintiff was convicted, 29-30 Vic. ch. 51, sec. 254, only authorizes a conviction for selling intoxicating liquors of any kind, while this conviction is for selling a certain spirituous liquor called whisky. Now the Statute itself, in various sections referring to licensing and sale of liquors, uses the expression spirituous liquors, and in the very section creating the offence we find these words in reference to the notice to be exhibited by persons licensed; and the 256th section, which provides that all prosecutions for penalties incurred by persons vending wines, rum, &c., or other spirituous liquors, without license, shall be recoverable, &c., evidently including as one of the penalties that of selling intoxicating liquors; and by the 261st section the word "liquors" shall be understood to mean and comprehend all spirituous and malt liquors, and all combinations of liquors or drinks which are intoxicating; so that we find the expression intoxicating liquors and spirituous liquors in various sections as convertible terms, and used by the Legislature as meaning and referring to the same kind of liquors.

It was also argued that the conviction specified whisky, which we could not on demurrer judicially notice as being an intoxicating or spirituous liquor, but we find in the same session of Parliament, that in the Customs Act, ch. 6, under the head of spirits and strong waters for duty, is specified brandy, gin, rum, whisky, &c., and other spirituous liquors; and the Legislature thus recognizes whisky as a spirituous liquor.

We see nothing in the objection that it does not appear by the conviction that the proceedings were commenced within twenty days from the date of the offence, limited by the 259th section, as the fact sufficiently appears on the face of the conviction.

It was also contended by Mr. Harrison that the conviction should have negatived that the sale charged was a sale in original packages, under the exception contained in the 252nd section, which requires no license to sell. But the conviction charges the plaintiff with selling a pint of

whisky, which fact itself takes it out of the exception, for we cannot but judicially notice that a pint is less than five gallons or one dozen bottles, and that fact is not consistent with the innocence of the plaintiff, as suggested by Mr. Harrison.

It seems to us that there is nothing in the objection that the conviction specifies the amount of costs (\$1), of conveying the plaintiff to jail, provided sufficient distress should not be found. The form given by the Statute provides that it shall be stated the defendant shall pay such costs, the same being contingent only, and if a warrant issues the form given is set out; but we see no good reason why the Justices should not state the amount in the conviction, or if stated that it vitiates the conviction. Specifying the amount is only a notification to the defendant what he shall have to pay in the event of no distress and he is arrested.

Several other objections were suggested, but we think they are all answered by the fact that the conviction follows the form given by the 103rd chapter of the Consol. Stat. C., which is made applicable and to be followed in convictions of this nature, under the 259th section. These forms were intended by the Legislature for the guidance of Justices, and to provide for them a simple form, with a view of preventing a failure of justice, to meet such trivial objections as were taken in the Court below, and it is the duty of this Court to carry out the object of the Legislature, and to strive to support convictions against objections of a mere technical character.

Having thus disposed of the objections to the conviction, we have now to consider the objections taken to the manner in which the warrant is set out. The avowry states that the goods were taken, &c., under a warrant of distress, duly issued by the defendant McWhinnie, as and being a J. P. of the County of Oxford, for non-payment of the penalty and costs adjudged to be paid by the plaintiff under the terms and provisions of the conviction; and because the plaintiff made default in payment of the said penalty and costs, and the same were unpaid at the time when the warrant of

distress was issued as aforesaid, and was delivered for execution to the defendant Martin, &c.; and then it proceeds, and the defendant Martin, as being a constable of, &c., in the County of Oxford, and as being the bailiff, &c., well acknowledges the taking, &c., the goods under the said warrant as and for a distress for the penalty and costs so adjudged to be paid to the plaintiff.

It was first objected that the warrant did not appear to be under seal, but we think the objection is disposed of by what Mr. Chitty in his Pleading, vol. 1, p. 244, says: "So where it is pleaded that the Sheriff made his warrant, it is unnecessary to say that it was under his seal, for it could not be his warrant if it were not."

It was also objected that it does not appear that the warrant was directed to any one, or that it was delivered to the defendant Martin, or that he was a constable. It is answered it was duly issued, and to be duly issued on demurrer we may assume that it was directed to all or any of the constables, &c., of the County of Oxford, in pursuance of form (N. 1), appended to chapter 103; and it says, was delivered for execution to the defendant Martin.

We cannot concur in the view taken by the learned Judge in the Court below, that there is no averment in the avowry that defendant Martin was a constable, &c., and that the warrant was delivered to him to be executed. The avowry sets out, because default was made by plaintiff, &c., because the warrant was delivered to Martin, defendant McWhinnie avows, &c., and also defendant Martin being a constable, &c., he well acknowledges the taking, &c. Mr. Chitty in his Pleading, Vol. I., p. 333, says, "An averment may be in any words amounting to an express allegation that such a fact or facts existed," and among the words as examples he gives "because" or "being."

Nor do we see any objection affecting the warrant arising from the statement of the \$1 costs for carrying the plaintiff to gaol. The warrant of distress, being duly issued according to the terms and provisions of the conviction, could only authorize a distress for the amount of

the penalty and costs of conviction (see form N. 1) which the avowry states. It would be putting a forced construction on the words of the avowry to hold that it shews the warrant of distress directed a distress for the costs of conveying the plaintiff to gaol, such costs being only contingent, and for which the plaintiff was not liable by the conviction itself unless no distress could be found. The same objection would apply if the \$1 costs had not been mentioned in the conviction.

We are therefore of opinion that this appeal must be allowed, and that the judgment of the Court below be reversed, and that judgment on the demurrer be given for the defendants.

Appeal allowed.

HOOKER ET AL. V. LESLIE.

Promissory note payable in U. S.—In what currency payable.

A note made here payable at a place in the United States, but not “not otherwise or elsewhere,” is payable generally, and the law and currency of the place of contract must govern.

Declaration on a note, made at Toronto, payable to plaintiffs, for \$302.79.

Plea, that the note was payable in Rochester, in the United States, where the plaintiff resided: that when it fell due Treasury notes of the U. S. Government were a legal tender in payment of all notes: that if the defendant had then tendered the amount of the note in Treasury notes it would have been a good tender: that \$144.53 of lawful money of Canada then equalled in value Treasury notes to the amount of the note; and defendant brings that sum into Court.

Held, assuming the note to have been payable at Rochester, but without the words not otherwise or elsewhere, that the plea was bad.

ERROR from the County Court of York and Peel.

Declaration. That the defendant, at Toronto, on the 15th September, 1864, by his promissory note now overdue, promised to pay to the plaintiffs, or order, \$302.79, three months after date, but did not pay the same,

First plea. That the said note was payable at the city of Rochester, in the State of New York, one of the United States of America, at which place the plaintiffs resided, and

at and from the time of making the said note till and at the time the same became payable; and that at and from the time the said note was made, and thence hitherto, certain instruments called and known as treasury notes, whereby the Government of the United States agree to pay to the bearer thereof certain sums therein specified on certain days therein specified, were and are in the said State of New York by lawful authority made and constituted lawful money, and a legal tender for the amount therein specified to be thereby payable for a like amount, in payment of all debts payable within such State from and by one or more individuals, and of all promissory notes, except those payable by the said Government; and that at the time the said note became payable, if the defendant had tendered to the plaintiffs at the said city treasury notes as aforesaid payable to such an amount as would equal the amount made payable by the said note, the same would have been at the said city a good legal tender to the amount made payable. And the defendant says that at the time the said note became payable, the sum of \$144.53, of lawful money of Canada, equalled in value such treasury notes as aforesaid, to such an amount and quantity as at such time at the said city would have sufficed to pay the said note, and there then have been a good legal tender in payment thereof. And the defendant brings into Court the sum of \$146.48, of lawful money of Canada, and says that the said sum is enough to satisfy the claim of the plaintiffs in respect of the said note.

Second Plea. That the said note was to be paid when it fell due, in lawful money of the United States of America. And the defendant says that the sum of \$144.43, of lawful money of Canada, was at the time the said note fell due equal in value to the amount of the said note in lawful money of the said United States. And the defendant says that the sum of \$146.48 of lawful money of Canada, in the first plea mentioned, and brought into Court, is sufficient to satisfy the plaintiff's claim.

Demurrer, on the grounds, as to the first plea :—

1. That the declaration is upon a note payable in lawful money of Canada : that the said plea admits it to be, and yet avers that it is payable in something else than money of the Province of Canada.

2. That the plea avers that the note is payable in Rochester, in the State of New York, which does not displace the legal effect of the note in writing declared on, inasmuch as the plea does not aver that it was payable in Rochester, in the State of New York, only, and not otherwise or elsewhere.

3. That the plea is bad in setting up in effect the payment of a smaller sum as sufficient to pay a larger sum.

4. That the plea should have averred the value of the treasury notes at the time the plea was pleaded : that from all that appears from the plea the treasury notes were at the last mentioned date worthless, and would have been no satisfaction of the plaintiffs' claim.

As to the second plea, that the note declared on is for payment of lawful money of Canada : that the defendant cannot contradict that which appears upon the face of his written contract in said note.

That the declaration avers that the note is payable in lawful money of Canada : that the plea set up a contract to pay in something else : that if the defendant relied on the contract being a foreign one, he should have alleged it was made in a foreign country,

Judgment was given below for the plaintiffs, and the defendant brought error.

Harrison, Q. C., and G. D'Arcy Boulton, for the defendant, the plaintiff in error, cited *Crawford v. Beard*, 14 C. 13 C. P. 87 ; C. S. U. C. ch. 42 ; *Massachusetts Hospital v. Provincial Ins. Co.*, 25 U. C. R. 613 ; *Chitty on Bills*, 118 ; *Gibbs v. Fremont*, 9 Ex. 25 ; *Abraham v. DuBois*, 4 Camp. 269 ; *Taylor v. Booth*, 1 C. & P. 286 , *Judson v. Griffin*, C. P. 350 ; *White v. Baker*. 15 C. P. 292 ; *Rothschild v. Currie*, 1 Q. B. 34 ; *Royal Bank of Liverpool v. Whittemore*, 16 U. C. R. 429 , *Fergusson v. Fyffe*, 8 Cl. & F. 121.

E. Crombie, contra, cited *Meyer v. Hutchinson*, 16 U. C. R. 476; *Ross v. Winans*, 5 C. P. 185; *Wilson v. Aitkin*, 5 C. P. 376; *Bradbury v. Doole*, 1 U. C. R. 442; *Moseley v. Hanford*, 10 B. & C. 730; *Allen v. Kemble*, 13 Jur. 287; *Davis v. McSherry*, 7 U. C. R. 490.

HAGARTY, J., delivered the judgment of the Court.

On these pleadings we must take the note as the parties on each side assumed it in argument to be, a note made in Canada, payable in the United States, but without the restrictive words "not otherwise or elsewhere."

On this assumption our judgment may probably turn.

The Statute (Consol. Stat. U. C., ch. 42, sec. 5), provides that a note payable at a Bank or at any particular place, without further expression in that respect, shall be deemed and taken to be a general promise. With the added words the maker is not liable except in default of payment first demanded at such place, (sec. 6). This is taken from 7 Wm. IV. ch. 5.

Sec. 11 provides that when a note so made specially payable in the United States be made or negotiated in Upper Canada, and be protested for non payment, the holders may recover four per cent. damages, with expenses, &c., at the current rate of exchange of the day when the protest is produced and repayment demanded: that is to say, the holder may recover from the maker so much current money of this Province as shall then be equal to the purchase of a Bill of Exchange of the like amount drawn on the same place at the same date or sight, together with the damages, and interest and expenses, &c.

This provides clearly for the case of a note so specially payable.

We have to consider the position of a note drawn as the present is. Is it a contract performable in a foreign country, and to be governed by the *lex loci solutionis*?

In *Wilson v. Aitkin* (5 C. P. 376), certain notes were made in Canada, payable in sterling money at the office of the payees in Glasgow, not adding the words

“not otherwise or elsewhere,” and the question was whether sterling was to be calculated at the rate of £1. 4s. 4d. cy., under our Statute, or at the rate of exchange, exceeding that sum, so as to enable the plaintiff to purchase a bill and remit to Glasgow, where the notes were payable.

Macaulay, C. J., says: “It does not appear that the notes were in fact presented there for payment, or protested there for non-payment. On reference to the Statutes 7 Wm. IV. ch. 5, and 12 Vic. ch. 76 sec. 2, and the cases of *Rothschild v. Currie* (1 Q. B. 43); *Allen v. Kemble* (13 Jur. 287); *Gibbs v. Fremont* (9 Ex. 25.); and *Story on Bills*, sec. 177; it appears to me that by our law, or the *lex loci contractus*, the notes are payable generally, and that the plaintiff is only entitled to recover at the rate of £1. 4s. 4d. to the pound sterling.” He refers also to a case in the same volume of *Ross v. Winans*, p. 185.

In *Bradbury v. Doole* (1 U. C. R. 442) the action was on a note made in Upper Canada, payable in Montreal. Robinson, C. J., said, “The note having been made in this Province, payable in Montreal, was in its creation an inland note, being in effect payable generally by virtue of our Statute 7 Wm. IV., ch. 5. * * * Now an inland note of this Province, made and payable here, which this note really is, is, by analogy with inland bills, to be protested on the day after the last day of grace,” &c., &c. Macaulay, J., also speaks of it as “a domestic note;” and in *Meyer v. Hutchinson* (16 U. C. R. 476) it was ruled that a note made in Toronto, payable at a bank in New York, without the restrictive words, did not give the holder a right to the four per cent. damages, under the Statute already cited.

We are not aware of any decisions of our own Courts bearing so closely on the point in question as these.

It seems clear that on a contract clearly performable in the United States, the measure of damage is a sum sufficient to place the plaintiff in the position he would have been in had the contract been kept. *Crawford v. Beard* (14 C. P. 90) is clear on that head.

Wood v. Young (*Ib.* 250) is partly to the same effect.

White v. Baker (15 C. P. 292) was much relied on by defendant in argument. That was the case of notes made in the United States and payable there, and suit brought against defendant in Canada, and it was assumed that the claim would be satisfied by as much Canada money as would pay at maturity.

Judson v. Griffin (13 C. P. 350) was the case of a note made and payable in the United States.

In *Byles on Bills*, Ed. of 1866, p. 386, it is said "a general acceptance being a contract to pay everywhere, is governed by the law of the place where it is given, for it is payable there as well as in every other place"—citing the judgment of Lord Brougham in *Don v. Lippmann* (5 Cl. & F. 12.)

We may assume that if this contract be, as defendant insists, performable in the foreign country, he is not bound to pay more than an amount equal to the foreign currency at maturity.

But if this note be in its legal effect payable generally, it would seem that the law and currency of the place of contract must govern. *Gibbs v. Fremont* (9 Ex. 25) is to that effect. Alderson, B., says, "The general rule in all cases like the present is that the *lex loci contractus* is to govern in the construction of contracts. But that applies only where the contract is not express. If it be special it must be construed according to the express terms in which it is made." That case turned on a claim for interest on a bill drawn in California on parties in Washington endorsed to English holders, and the drawers were sued in England. Was California interest at twenty-five or Washington interest at six per cent to be recovered? It is there said by the Court, that if interest be not specified "it seems to follow the rate of interest of the place where the contract is made. So, if the mode of performing it be expressly or impliedly specified: *Rothschild v. Currie*. In the case of a bill drawn at A, it *primâ facie* bears interest as a debt at A would do, if nothing else appear. * * This is a contract

at Ciudad de los Angeles, by which the defendant there offers the payee, in discharge of a debt due there, the payment at Washington by an acceptor there of a given sum. That payment is not made. The defendant's original liability then revives on notice of dishonor duly given to him." The California interest was held recoverable. *Allen v. Kemble* (13 Jur. 287) is referred to as in point.

The doubts raised by Story as to *Rothschild v. Currie*, are noticed in this and a very late case of *Herschfeld v. Smith* (L. R. I. C. P. 340), but the Court in the latter say that they follow the doubted case.

We think the plaintiffs below, who are defendants in error, are entitled to our judgment.

Judgment for defendants in error.

COMMERCIAL BANK V. HARRIS ET AL.

New trial—Usury.

To an action on promissory notes amounting to \$10,000, defendants, among other defences, pleaded usury, consisting of a charge of $\frac{1}{4}$ per cent. made by the plaintiffs on cheques. When the case was called on no one appeared for the defendants, and the plaintiffs had a verdict. The Court refused to relieve the defendants on the merits, except on condition of their withdrawing the plea of usury.

DECLARATION, on four promissory notes, amounting to over \$10,000; W. R. Harris, maker, T. D. Harris, payee and indorser.

Besides pleas of payment and set-off, the defendants pleaded usury; that the plaintiffs were a Banking Corporation: that it was corruptly agreed that the plaintiffs should lend and advance to the defendants \$16,000, giving day of payment therefor at seven per cent., and that the defendants should also pay $\frac{1}{4}$ per cent, on moneys paid by the plaintiffs on the defendants' cheques and orders, being a contrivance to evade the law, &c.; that a loan was made and

many cheques drawn, to wit, to \$16,000, on which the $\frac{1}{4}$ per cent. was taken, and afterwards \$10,000 was due, on account of which the notes declared on were taken, &c.

Issue was joined, and the cause entered for trial at the last York Assizes, before Hagarty, J.

The case was called, with others, on Friday, and, some person on behalf of the defendants being present, there was much discussion about this and other cases in the docket. The Court after this discussion adjourned several hours before the usual time, after three cases being struck out. Next day two or three cases were tried, and this case again called, and the Court declined any further adjournment as a mere waste of valuable time. The plaintiffs did not in any way press the case, but to prevent its being withdrawn or struck out announced that they were ready. A jury was called, and the issues being on the defendants, and no one appearing for defendants, a verdict was taken for \$10,875.

McKenzie, Q. C., obtained a *rule nisi* to set aside the verdict, on affidavits that he was absent from the city on business, and had left instructions that if he did not return in time other counsel should be instructed, and on affidavits of merits. He cited *Fourdrinier v. Bradbury*, 3 B. & Al. 328; *Moore v. Hicks*, 6 U. C. R. 27; *Doe Dunlop v. McNab*, 5 U. C. R. 289; *De Rouffigney v. Peale*, 3 Taunt. 484; *Delafield v. Tanner*, 5 Taunt. 856; *Evans v. Gill*, 1 B. & P. 52; *Townley v. Jones*, 29 L. J. C. P. 299.

Crooks, Q. C., shewed cause, filing affidavits. He cited *Drake v. Bank of Toronto*, 9 Grant 116; *Lush. Prac.*, Vol. I., p. 458, vol. II., p. 637.

HAGARTY, J., delivered the judgment of the Court.

It was urged before us that the defendants had a meritorious defence on the issues as to payment and set-off, and that the pleas of usury were also true.

The plaintiffs expressed their willingness to the verdict being set aside and the case tried fully on these issues, if

defendants would withdraw their pleas of usury, and offered in addition to accept merely disbursements instead of full costs.

The defendants insist on holding to their pleas.

We have read all the cases cited and others also, and have consulted the books of practice. The plaintiffs have obtained a verdict perfectly regular as far as they are concerned, and they are in no way involved in the defendants' omission of their duty to be prepared. They object now to have their verdict taken from them, obtained without fault on their part, to enable the defendants to urge a defence such as is disclosed in those pleas.

The alleged usury is not on its face a very startling violation of the law. It consists, as we understand it, in lending some \$16,000 at seven per cent, the legal Bank rate, and charging in addition twenty-five cents for every one hundred dollars checked or drawn out of this large sum. On the face of the pleas it would seem that the defence is that on this sum of £4,000 a charge of £10 was made on the cheques, which avoids the whole transaction and exonerates the defendants from the payment of the whole sum advanced.

Parties have an undoubted right to urge such a defence if so advised, and full effect must be given to it if proved, without reference to the consequences.

But when full opportunity is given for such purpose, when the plaintiff has brought his case to trial and lawfully obtained his verdict, the defendants not thinking proper to attend to prove the defence, then if the Court is applied to to relieve the defendants from the consequences of their omission to defend, and to deprive the plaintiffs of their verdict, it becomes a very different matter.

We understand an application to set aside a verdict regularly obtained on any ground such as is here suggested not to be in any way *ex debito justitiæ*, but wholly to the discretion and indulgence of the Court.

Many of the authorities refer to applications to set aside regular interlocutory judgments on the merits.

In *Lush's Practice*, Vol. I., p. 458, it is said: "This appli-

cation is not *ex debito justitiæ*, but *ex gratiâ*, and therefore where the defendant had rejected fair and equitable terms of compromise, the Court of Common Pleas refused to hear it. (*Anon.* 4 Taunt. 885.) * * It is no objection that the defendant means to plead infancy, bankruptcy, or any other fair defence; but the application has been refused where the object was to put in a plea of usury, or the Statute of Limitations." The two cases cited do not bear out this assertion. We have found no case where anything is said about the plea of usury, and Mr. Lush would appear to be in error as to the Statute of Limitations.

In *Tidd's Practice*, 8th ed., Vol. II., p. 941: "It is a general rule not to grant a new trial except for the misdirection of the Judge, * * after a verdict for the plaintiff, where the defence is unconscionable and the verdict is found according to the justice and honesty of the case." This is after an actual trial.

In *Graham and Waterman on New Trials*, Vol. I., p. 174: "But to entitle the party to relief there must be merits, and the surprize must be such as care and prudence could not provide against. The slightest negligence will defeat the application, or occasion the imposition of rigorous terms."

In *Doe Cooling v. Appleby* (4 P. & Dav. 538), a rule was granted on affidavits that the cause stood eighteen in the cause list; that the cases preceding had gone off very rapidly, and the defendant was unprepared, and cause taken as undefended. This was very like the position of affairs here. It was stated for the plaintiff that it was apprehended that the defendant intended to set up an outstanding term, and the Court made it a condition of a rule for new trial on payment of costs that he should not do so.

This was a very strong case against defendant's application to our discretion.

We are informed by the Court of Common Pleas that in *Evans v. Robinson*, not reported, but decided in Michaelmas Term, 1859, a verdict was taken in the absence of the defendant *pro confesso*, who had been duly notified to appear as a witness, no other evidence being given. Appli-

cation was made for a new trial, defendant swearing he intended being present, but did not think the case was coming on when it did, and that he had a defence on the merits. The action was on a guarantee, and the defence was shewn to be an objection that no consideration was stated for the promise to pay the debt of another. After hearing the affidavits as to the merits, the Court refused the new trial, declining thus to give the defendant a second opportunity to urge such a defence.

In *Nash v. Swinburne* (3 M. & G. 632), on application for a new trial, where the case had been taken in the absence of defendant, Tindal, C. J., says, "After so much negligence there ought to be a very clear case of merits to induce the Court to interfere." In *Chitty's Archbold*, 12th ed. vol. ii. p. 988, speaking of application to set aside interlocutory judgment, it is said, "As it is wholly discretionary, however, in the Court or Judge to grant it, they will not grant it in order to give defendant an advantage of any nicety of pleading, or of any matter which does not go to the merits of the cause."

In *Beck v. Mordant* (2 Bing. N. C. 140), the Court set aside a regular judgment on the merits, and allowed defendant to plead to an action on an attorney's bill non-assumpsit, composition and set-off, but said they were clearly of opinion that a plea that no bill had been delivered, as required by Statute, was not under the circumstances, (the bill, though not formally signed, having been delivered three months before the action, and no objection made) a plea to the merits; and refused to allow it. We also refer to *Stinson v. Scollick* (2 O. S. 217), and to *Pardow v. Beatty* (6 U. C. R. 496).

The present seems to be clearly an application to the Court *ex gratiâ*, and the Court in dealing with it must abide by the rules which seem to have always prevailed.

If defendants had applied for relief to a Court of Equity, it could only be on their agreeing to pay all that they honestly owed, and legal interest. Can we *ex gratiâ* relieve them from the consequences of their own laches,

and deprive the plaintiffs of their verdict, except on fair terms?

The defendants who wanted to set up an outstanding term as a legal bar to an action of ejectment, or to plead that no bill signed according to the Statute had been duly delivered, when they had to ask for the indulgence of the Court, were refused except on terms of waiving such strictly technical defences. The defence sought to be urged before us seems to be infinitely more objectionable both in principle and in form.

The plaintiffs have lawfully obtained their verdict, and it seems to us that we should be doing what no Court has hitherto done, if we deprived them of that advantage to give defendants a second chance of escaping the payment of some thousands of pounds, on an alleged charge of one-quarter per cent on their cheques drawn on plaintiffs' bank.

We have not disposed of this application without enquiring amongst our brother Judges as to the usual course heretofore pursued on similar applications to the discretion of the Court.

Unless defendants accept the terms offered, of withdrawing their usury pleas and paying the disbursements within ten days from this time, the rule must be discharged, otherwise absolute.

ROSS ET AL. V. GRANGE.

Practice—Moving against Judge's order—Chambers—Jurisdiction.

A Judge's order must be moved against in the term next after it is made; and it was held no ground for relaxing this rule, that the motion had been erroneously made in the Practice Court in the first instance. *Semble*, that a Judge in Chambers has no power to set aside a judgment on demurrer regularly signed after argument.

McMichael obtained a rule this term, calling on the defendant to shew cause why the order of John Wilson, J., made on the 5th October, 1866, setting aside the judgment on demurrer, and all subsequent proceedings, and giving the

defendant leave to plead, should not be set aside with costs, as being made without jurisdiction.

C. Robinson, Q. C., for the defendant, also obtained a cross rule, asking for leave to plead the plea mentioned, and to set aside the rule of Trinity Term, 1866, allowing the plaintiffs to enter judgment on demurrer, and the judgment thereon, on the merits, on terms.

Both rules were argued together.

This Court had given judgment as of Easter Term, 1866, against the defendant's plea, with leave to amend on payment of costs within a named time. See *Ross v. Grange* (25 U. C. R. 396). The time was allowed to elapse without amendment, and judgment was signed. The damages would have had to be assessed at the Guelph Assizes.

On the 2nd October, 1866, on the return of a summons, John Wilson, J., having the parties before him, and considering there was explanation given of the delay, and the peculiar nature of the action, set aside the judgment, and allowed the defendant to amend his plea, (a), on stringent terms as to going down to trial at the then next Assizes, and on the defendant paying \$50, without prejudice to the plaintiffs moving to rescind the Judge's order, to be applied to the costs of demurrer, &c., to be taxed, the surplus if any to be refunded, and the deficit if any to be paid by the defendant.

The money was paid and had been retained by the plaintiffs.

Next term (Michaelmas Term, 1866), in Practice Court a motion was made to rescind the Judge's order, and a rule *nisi* granted, which for some not very clear reason remained unargued for twelve months, and was finally discharged as of last Michaelmas Term, 1867, not on the merits, but on

(a) The order was, "that the defendant be allowed to amend his plea by pleading a plea to the effect of the plea proposed to be pleaded referred to in the affidavit filed, which is to be considered an amendment under the rule of Court giving judgment on demurrer for the plaintiffs with leave to amend; and notwithstanding the rule absolute in Practice Court of last term, and the judgment on demurrer signed in this cause, that the said judgment on demurrer and subsequent proceedings had thereon be set aside," &c.; setting out the terms.

the ground that application should have been made to the full Court; see *Ross et al. v. Grange*, 4 U. C. L. J. 41, N. S.

C. Robinson, Q. C., for the defendant, objected that this application was too late, the previous application in Practice Court and the delay thus occasioned, forming no excuse: *Buffalo and Lake Huron Railway Co., v. Hemmingway*, 22 U. C. R. 566. He contended also that the Judge in Chambers had jurisdiction to make the order moved against, the judgment on demurrer being interlocutory only, citing *Wilmot's Opinions*, 264-5; *Orgill v. Bell*, 1 Ex. 466; *Joseph v. Perry*, 3 Dowl. 699; *Darrington v. Price*, 6 C. B. 309; *Richmond v. Proctor*, 3 U. C. L. J. 202; *Mearns v. The Grand Trunk Railway Co.*, 6 U. C. L. J. 62; *Lush* Prac. 947-8; *Ch. Arch. Prac.*, 12th ed., 523, 933, 985, 1598.

McMichael and Stephens, for the plaintiffs, cited *Hayward v. Bennett*, 3 C. B. 420; *Atkinson v. Bayntun*, 1 Scott, 424.

HAGARTY, J., delivered the judgment of the Court.

We see no valid answer to the objection that the application to this Court comes too late. It is very clear that an application to rescind a Judge's order must be made very promptly.

The *Buffalo and Lake Huron Railway Co. v. Hemmingway* (22 U. C. R. 565), and the cases there cited, are very clear as to the necessity of applying at least in the Term next after the order, and equally so whether the order is without jurisdiction or not.

We do not think that the plaintiffs can be without the application of this wholesome rule, because they have applied to the Practice Court and tied the matter up there for a year. They must take all risks as to applying to the proper tribunal. The full Court here, as in England, seems to be the proper tribunal to rescind a Judge's order, except where it is sought to be rescinded on matters arising afterwards, and not in review of the Judge's discretion or right to make the order.

We think the plaintiffs' rule must be discharged.

This decision renders it useless to discuss the cross rule, which Mr. Robinson stated he only moved by way of precaution, if the Judge's order had been rescinded.

The case is one against a Sheriff, seeking to make him liable for the loss by fire of property prior to his having seized it. The plaintiffs have not been thrown over any Court by the defendant's action. Had they submitted to the order they could have gone down at the Fall Assizes of 1866.

Although our decision does not turn on the right of the learned Judge to make the order, we think it right to add our strong impression that it was beyond the power of a Judge in Chambers.

No practical difficulty can arise from this view. If, as was suggested, a party were prevented from amending within the time allowed by the rule of Court by any good cause, he could apply to a Judge in Chambers, who, if the opposite party would not consent, could stay proceedings till next term whenever the clear justice of the case required, and the Court could then deal with it.

Under the circumstances we discharge both rules without costs.

Rules discharged.

GILPIN ET AL V. THE ROYAL CANADIAN BANK.

Trover—Evidence of conversion—Property afterwards burned—Receipt by plaintiffs of insurance money.

Plaintiffs had a large quantity of wheat in the warehouse of one T., for which they held his receipt, and defendants also held T.'s receipt for wheat in the same place, on which they had made advances; but there was not enough wheat to satisfy both. T. having left the country, gave R., defendants' agent, a letter to C., who was in charge of the warehouse, directing him to give R. possession of the warehouse and all grain in it belonging to him, T. On receiving this letter C. gave R. the key, went with him into the warehouse and pointed out T.'s wheat, and received back the key, agreeing to hold possession. On the same day R. again got the key to go into the place with one M., and again returned it to C., who said he considered he still had possession of the store, and that he would not have given up the wheat to the plaintiffs if R. had so directed him. Plaintiffs demanded their wheat from R., who, as they alleged, answered "I won't do so at present," but almost immediately after defendants' attorney served a written disclaimer on the plaintiffs, informing them that defendants disclaimed all possession of the store-house and wheat therein. On the same day the plaintiffs brought trover.

Held, assuming the facts most favourably for the plaintiffs, that it should have been left to the jury to say whether R. entertained a *bonâ fide* doubt as to the plaintiffs' right to the wheat, and whether a reasonable time had elapsed for clearing it up; and *Quære*, whether the facts could legally suffice to establish a conversion.

Evidence was rejected that the plaintiffs had insured the wheat sued for and had received the insurance money, the fire having taken place two days after the alleged conversion. *Semble*, that such evidence should have been received, as shewing the plaintiffs' conduct and dealing with regard to the property after the alleged conversion, and thus being relevant to the issue.

TROVER for 4872 bushels of spring wheat, and 636 bushels of fall wheat, &c.

Pleas—Not guilty, and not possessed.

At the trial, at Stratford, before Draper, C. J., the facts appeared as follow:

The defendants had made advances to one Todd, a warehouseman at Seaforth, and held warehouse receipts from him. The plaintiffs held his receipts also, and according to the evidence had wheat to a large amount in the warehouse. After Todd had left the country one Russell, defendants' agent at Seaforth, obtained from him a letter to Coleman, his warehouse keeper, dated at Milwaukee, 14th March, 1867, as follows:—"Please give Mr. Russell possession of the store-house and all grain belonging to me."

On the 15th (Friday), Russell gave this letter to Coleman, who said he agreed to hold possession, and gave Russell the key, Russell telling him to hold Todd's grain. Russell went with him into the store to examine the grain, and Coleman pointed out Todd's wheat. Russell returned the key to Coleman after the visit, and again on the same afternoon got it again to go into the store with one McDougall, and again returned it to Coleman. The latter swore he considered he still had possession of the store, and that Todd had wheat there. The learned Chief Justice in his notes said, "It appears that Coleman never put Russell into possession, and swears he would not have given up the wheat to plaintiffs if Russell had so directed him."

On that Friday evening, about seven or eight o'clock, these plaintiffs, or one of them, demanded their wheat from Russell. Other parties claiming to have wheat there did the same, and there was considerable contradiction as to what took place. For the defence it was insisted that he said he had nothing to do with their (*i. e.* the plaintiffs') wheat, and that one Hayward, the agent of defendants at Stratford, told them that if they applied to Coleman they could get their wheat. Nothing positive as to any refusal by Russell appeared to have taken place that evening. On the following morning about nine or ten o'clock, there was another conversation, and the plaintiffs' witnesses swore that Russell in answer to the demand then made said, "I won't do so at present;" and one witness, Sommerville, swore Russell said he or the Bank had sold the wheat and passed possession to the purchaser.

Almost immediately after this conversation defendants' attorney at Seaforth prepared a disclaimer on their part, and it was at once served on the plaintiffs, informing them that the defendants "disclaim all possession of the storehouse and wheat therein, lately occupied by one Robert Todd."

The writ appeared to have been issued on the same day, Saturday, the 16th March. All this took place at Seaforth, and the writ must have issued at Stratford, the county

town, and inevitably, from the distance, must either have been issued after receipt of the disclaimer, or must have been ordered by telegraph or otherwise before the morning conversation.

On the Sunday night or early on Monday morning following, the warehouse with its contents was destroyed by fire.

Evidence was offered and rejected of the plaintiffs' assertions and admissions that they had insured the wheat sued for, and had received the insurance money.

A non-suit was moved. 1.—On the question of agency, that there was no evidence of any conversion by Russell for which defendants were responsible. 2.—That there was no evidence of any conversion by him at all, nothing to shew he was in possession of the wheat claimed: that he only got the key twice to see the wheat of defendants, returning it to Coleman each time, and exercising no control: that he had not the key when the demands were made, and that he never claimed or exercised control except as to Todd's wheat: that a demand and refusal was not in itself a conversion, but only evidence of it, and being rebutted here by the other evidence, was not sufficient to go to a jury.

Leave was given to move for a non-suit as to the question of agency only, in order to facilitate an appeal, that point having been already decided in the plaintiffs' favour. See *Gilpin v. Royal Canadian Bank* (26 U. C. R. 445.)

The jury were told that the defendants were bound by Russell's acts; and that there were two questions—1st, conversion: 2nd, the plaintiffs' right to the wheat. As to the latter, that the evidence was altogether in the plaintiffs' favour: as to conversion, were the plaintiffs prevented from getting their wheat by the acts of Russell? that Russell, as such agent, if he had a control over the property demanded which enabled him to withhold it, was a proper person on whom to make the demand. Had he such control, or had he assumed possession by assuming possession of the warehouse, or had he only a right of entry at any time to take and dispose of the wheat belonging or believed to have

belonged to Todd, and for which the defendants held Todd's warehouse receipts. This was left as a question of fact to the jury.

For the defendants the former objections were renewed to the charge, and it was objected, further, that if there was at one time a refusal, it was done away with by the disclaimer, which had been proved on the part of the defence.

The jury found for the plaintiffs, \$5896.50.

In Michaelmas Term *Harrison*, Q. C., obtained a rule for a new trial for the rejection of evidence, and for misdirection, in holding there was evidence of a conversion and that the defendants were liable for Russell's acts; or to enter a non-suit on the leave reserved; or for a new trial on the law, evidence, and weight of evidence.

Anderson shewed cause, citing, as to the question of agency, *Grant* on Banking, 532; as to the rejection of evidence, *Yates v. Whyte*, 4 Bing. N.C. 272; *Mason v. Sainsbury*, 3 Doug. 61; *Clarke v. Hundred of Blything*, 2 B. & C. 254; as to the evidence of conversion, *Burroughes v. Bayne*, 5 H. & N. 296; *Pillot v. Wilkinson*, 2 H. & C. 72, S. C. In Appeal, 3 H. & C. 345.

C. Robinson, Q. C., and *James Paterson* supported the rule, citing *Alexander v. Southey*, 5 B. & Al. 247; *Vaughan v. Watt*, 6 M. & W. 492; *Thompson v. Trail*, 9 D. & R. 34; *Catterall v. Kenyon*, 3 Q. B. 310; *Lovekin v. Podger*, 26 U. C. R. 156; *Add. T.* 272; *Hayward v. Seaward*, 1 M. & Sc. 459.

HAGARTY, J., delivered the judgment of the Court.

It is difficult to understand on what principle we can hold that there was sufficient legal evidence to support the verdict, when this action was commenced, of a conversion of plaintiffs' goods by the defendants, or any actual interference with their right to obtain possession of them.

Taking a view of the conversation on the Saturday morning most favourable to the plaintiffs, it amounted to this: that in reply to a demand to deliver their goods, Russell

said "I won't do so at present." Were the goods then in his possession or under his control? He had not even the key of the warehouse, and Coleman, the warehouse-keeper, swore he never put Russell in possession, and would not have given plaintiffs the wheat even if Russell had told him to do so.

All the parties to the dispute were aware of the real difficulty. The Bank claimed the wheat in the warehouse belonging to Todd. The plaintiffs claimed on prior receipts given by Todd to them, and there was not enough to satisfy both claims. It is clear that Russell told the plaintiffs he had nothing to do with their wheat, and the obvious meaning of the words sworn to, spoken just at a moment when the dispute as to the true ownership of the wheat in store was going on, and when others besides the plaintiffs were claiming the wheat as their property, all sufferers by Todd's frauds, must have been, "I won't give you the wheat at present, while this uncertainty exists as to our respective rights. I must have time to consider." Then almost immediately after, and certainly without any unreasonable delay, having consulted his legal adviser, the plaintiffs are formally notified that the defendants disclaim all possession of the store and wheat therein, leaving the plaintiffs to settle as best they might with Coleman, who had already defined his position in the matter, and held the key of the warehouse. All this takes place in the forenoon of Saturday, almost one transaction. Then the plaintiffs hasten to issue a writ, and insist that a conversion of their property has taken place.

In *Vaughan v. Watt* (6 M. & W. 497), Parke, B., says: "It was a question for the jury whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for so doing had not elapsed, without which it would not have been a conversion. It ought therefore to have been left to the jury whether the defend-

ant had a *bonâ fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed * * It is all for the jury; however strong the facts, the Judge cannot take it upon himself to refuse to leave the question to them."

In *Pillott v. Wilkinson*, (3 H. & C. 346), Williams, J., delivering the judgment of the Court of Error, says: "We think the law is correctly laid down in *Vaughan v. Watt*," citing the words quoted above. He proceeds: "Here, assuming the defendant entertained a *bonâ fide* doubt as to whether the goods belonged to the plaintiff, the question remains whether a reasonable time for clearing up that doubt had elapsed. The same view of the law was taken by the Court of Common Pleas in *Towne v. Lewis*, (7 C. B. 600). The marginal note to that case is calculated to mislead. * * It was a question for the jury not only whether the defendant entertained a *bonâ fide* doubt as to the plaintiff's title to the goods, but also whether a reasonable time had elapsed for clearing up that doubt; and if the jury were satisfied that there was unreasonable delay on the part of the defendant, they would be warranted in finding a conversion." * * The right view, he says, is taken by Coltman J., that there was upon the facts stated "nothing more than evidence from which the jury might, if they pleased, have found a conversion, if they had been satisfied that there had been wilful and unreasonable delay on the defendant's part in complying with the plaintiff's demand."

This case in Error, decided in 1864, seems to give the latest state of the law on the subject, and seems especially applicable to the question before us. We have seen no case where on facts such as appear here the defendants have been held responsible.

We think this case should have been left to the jury with a direction in conformity with the law above cited, and we can hardly see how any conclusion otherwise than unfavorable to the plaintiffs could be reasonably expected. It may perhaps be doubted whether the facts proved could legally suffice to establish a conversion. If in this case a

conversion be upheld, it is not easy to see any practical use whatever in the doctrine, so strongly expressed, as to reasonable time or unreasonable delay.

As to the rejection of evidence, we incline to think that where the question was conversion or no conversion, it was competent for the defendants to shew what the plaintiffs' conduct and statements were at and immediately after the time as to their property in the grain in dispute. If the defendants had really on Saturday morning converted the plaintiffs' goods to their own use, they became responsible to the plaintiffs for their whole value. The plaintiffs abandon the goods to the defendants and seek compensation for their full value. On this view the plaintiffs' property in and right to control them would cease altogether. Or, on a actual conversion taking place, we suppose the plaintiffs could waive the wrong and sue the defendants for the price of their grain, as goods sold and delivered.

In either case their property would be at an end. When trover is brought the property is not changed until the recovery of judgment, and although up to that time the property may still be in the original owners, so that they might retake it under certain circumstances, or hold it if it came into their possession by finding, yet their so retaking or refinding might have a most important bearing on the amount of damages recoverable for the original wrong.

Where, as in this case, the contest is whether what the defendants did on and up to the Saturday morning amounted to a conversion or not, it would seem not to be irrelevant to the issue to prove that on the grain being destroyed on the next Sunday night the plaintiffs claimed it at once as their property, and demanded and received the sum previously insured by them thereon. This proceeding on their part seems to us to bear on the issue.

If within the same time the plaintiffs were found selling this grain as being their property in Todd's warehouse, in the ordinary course of business, we could hardly say that such a proceeding might not be given in evidence on this issue in favor of the defendants' contention that they were

claiming no right to the grain, and in no way interfering with the plaintiffs' right thereto. They would naturally point to the plaintiffs' own acts to prove that they must also so understand the true position of the case.

For if the defendants were tortiously withholding it, and the right then in controversy, it would seem, according to *Davis v. Browne* (9 U. C. R. 201), "they were not in a condition to sell to another what they had no actual undisputed control over themselves; they were in truth only transferring a chose in action."

So if this action of trover ripened into judgment, the property in this grain would thereby be held to have wholly passed from the plaintiffs to the defendants on the Saturday morning, and their right to recover the verdict they have obtained must be based upon such a supposition: *Buckland v. Johnson* (15 C. B. 162.)

We do not see our right to reject proof that after all this had taken place as the plaintiffs assert in effect, they claimed to recover and did recover from the underwriters the amount insured on this property as being theirs, or in which they were interested.

It was a dealing with the property in our view inconsistent with the position they must take for their recovery of the value of their property alleged to have been converted by the defendants.

We are expressing no opinion on this insurance proceeding as between these parties or the underwriters beyond its apparent relevancy to the issue of conversion or no conversion.

We think there must be a new trial without costs.

Rule absolute, (a).

(a) See *Todd v. The Liverpool, &c., Insurance Co.*, 18 C. P. 192, an action by these defendants in Todd's name for money insured upon the wheat mentioned in the receipts held by them.

NICHOLSON V. PAGE.

Trespass to land—Proof of title—Proof of plan.

In an action against defendant for cutting timber on the plaintiff's land, the plaintiff, to prove title, produced the patent to himself, giving no proof of any prior right by license of occupation or lease from the Crown. *Held*, that his title must be presumed to have begun only at the date of the patent; and the jury having evidently given damages for trees cut before that day, the Court ordered a new trial unless the plaintiff would consent to reduce the verdict to a sum specified.

A plan was produced from the Registry office, sworn to be that furnished by the Commissioner of Crown Lands. It was headed "Cardiff" (the name of the Township), and at the bottom was written "Department of Crown Lands, Ottawa, November, 1866. A. Russell, Assistant Commissioner," whose signature was proved.—*Held*, sufficiently certified, and receivable in evidence.

DECLARATION. First and second counts—Trespass to lot 16, in the 7th concession of Cardiff, and cutting and taking timber.

Third count. Trespass to plaintiff's goods, timber.

Fourth count. Trover.

Pleas.—Not guilty, and traverse of property, to each count.

The case was tried at Peterborough, before Richards, C. J.

The plaintiff produced a patent to himself for lot 16, dated 31st January, 1867.

He gave evidence of the proper boundary of the lot, and that Horan, a contractor under the defendant to cut and get out logs, at so much a log, on certain limits of defendant, came with men on lot 16, and cut 228 pine trees, producing about 800 pieces, and some other timber. The trees were sworn to be worth about \$2 to \$2.50, per tree. They commenced work in the latter end of November, 1866, and after the 1st January put up a stable and barn, cutting down some bass wood, cedar, and pickets. The evidence was not very explicit, but it went to shew that the bulk of all the timber cut and taken was before the plaintiff obtained his patent.

The evidence of the trespass being on 16 was reasonably clear. A plan was produced from the Registry office, which was sworn to be that furnished by the Commissioner of Crown Lands as the plan of the Township of Cardiff, and

the signature of Mr. Russell, the Assistant Commissioner, thereto was proved. This was objected to as not being properly certified. It was proved that Horan had been told by defendant not to trespass on lot 16; that if he was sure he was off the lot then to cut, if not sure, to keep off it.

It was objected that the plaintiff could not recover for anything done before his patent issued, and that the defendant was not responsible for Horan's acts.

The learned Chief Justice told the jury that on the first and second counts they must be satisfied that defendant or his servants trespassed on lot 16, and asked them to say was it so, and did 16 extend down to the Lake. He left the directions given to Horan as to lot 16 to the jury as evidence; and told them he did not think the plaintiff could recover the value of trees cut before his patent issued.

The jury at first found a verdict for the plaintiff generally. On being asked whether on the two first or two last counts, the foreman said the last two. The Judge then said, "You do not consider there was cutting on the land after the patent?" They then said they found generally, damages \$342.

Diamond obtained a rule *nisi* for a new trial on the law, evidence, and Judge's charge, on the ground that the alleged trespasses were committed while the land belonged to the Crown, and only nominal damages were recoverable after patent granted: that there was no sufficient evidence connecting the defendant with the trespasses; and for improper reception of the map without proper certificate or authentication. He cited *Henderson v. McLean*, 8 C. P. 42; *Henderson v. Sills*, *Ib.* 68; *Henderson v. McLean*, 16 U. C. R. 630; *Ostrom v. O'Connor*, 3 O. S. 571; *McLean v. McDonell*, 1 U. C. R. 13.

C. S. Patterson shewed cause.

HAGARTY, J., delivered the judgment of the Court.

We think the learned Chief Justice properly left it to the jury as to defendant's responsibility for Horan's acts,

and that there was evidence on the whole sufficient for their consideration.

As to the map, it came from the Registry office, and was sworn to be that received from the Crown Land office; and the signature thereto—it purporting to be the map of Cardiff—was duly proved.

The Registry Act of 1865, 29 Vic., ch. 24, sec. 79, directs that the Commissioner of Crown Lands shall furnish (*i. e.* to the Registrar), “copies of all plans or maps of towns and townships which have not been already furnished.”

23 Vic., ch. 2, sec. 4, declares that all the powers and duties which before the 17th March, 1845, were vested in the Surveyor General, should be vested in the Commissioner of Crown Lands. By sec. 30, copies of any records, documents, &c., belonging to or deposited in the Department, attested under the signature of the Commissioner or Assistant Commissioner, shall be competent evidence in all cases in which the originals could be evidence.

This plan is received and held in the Registry office as the plan received from the Department, who have a statutable duty to perform in sending it there. It is headed “Cardiff;” and at the bottom, “Department of Crown Lands, Ottawa, November, 1866. A. Russell, Assistant Commissioner.”

We think this was properly received as *primâ facie* evidence. It is to be regretted that public officers will not give such proper description and certificates on plans and other documents as will preclude the raising of such objections.

As against a wrong-doer, the plaintiff could no doubt rely on his being in possession of the land to enable him *primâ facie* to maintain trespass. So far the presumption is that he is the owner. But here the plaintiff begins by shewing the origin of his title, a patent from the Crown of the 31st January,—giving no proof of any prior right by license of occupation or lease from the Crown. We think the legal presumption in such a case is, that the plaintiff's title was only from the date of the patent.

It has been considered that a marriage between parties may be presumed from long cohabitation and repute; but if evidence be given, in addition, of a marriage in fact, which the parties fail in proving to have been legal, they cannot, we apprehend, fall back on the presumption from repute, &c., which appears to cease when the actual foundation of the presumed marriage is exposed and found deficient.

The jury have evidently given damages for the whole value of the timber taken, probably \$1.50 for each of the 228 trees. This would be the amount of their verdict, \$342.

There must be a new trial, costs to abide the event, unless the plaintiff will consent to reduce his verdict to \$40, which on this record will carry full costs.

THE JOINT BOARD OF GRAMMAR AND COMMON SCHOOL TRUSTEES OF THE VILLAGE OF CALEDONIA V. FARRELL.

Grammar school money—Receipt by County Treasurer—Liability and right of action for.

There being in a village a Joint Board of Grammar and Common School Trustees, on the 7th July the Chairman of the Board of Grammar School Trustees received a circular from the Education Office, advising him of the payment of \$202 for that school. This money had been paid into the Bank of Upper Canada at Toronto as agents for defendant, the Treasurer of the County, prior to its suspension, and the Bank sent him an order on their Hamilton branch, which was not presented before the Bank stopped payment in September. It was not asked for until the 25th September, when the Treasurer of the Joint Board called for it. On the 26th defendant wrote to the Treasurer of the Joint Board enclosing this draft, saying that it had been received by him for the grammar school, and had been lying in his office for their demand as usual since the 11th July. The plaintiffs having refused to accept the draft, *Held*—1. That an action for this money would lie against defendant as Treasurer, it having been paid to his agents at Toronto, and he having admitted its receipt for the special purpose.

2. That as the Board of Grammar School Trustees, notwithstanding the union, still existed as a separate corporation, the action should have been by them, not by the Joint Board.
3. If the action had been rightly brought, defendant would have been liable for the loss on the draft, for the payment was made to his agents at Toronto in money.

APPEAL from the County Court of Brant.

First Count. That the defendant was and is Treasurer

of the County of Haldimand, in which the plaintiffs' school section is situated, and as such Treasurer, to wit, on the 9th of July last past, received from the Educational Office for Upper Canada, as and being moneys payable and coming to the plaintiffs as the half-yearly apportioned money of the Grammar School Fund for Upper Canada belonging to the plaintiffs, a Bill of Exchange drawn by the Toronto branch of the Bank of Upper Canada on its branch in Hamilton, payable to the order of the defendant, for the sum of \$242, payable on demand, which the defendant received and took in payment to him of the moneys aforesaid, at which time, and until the 15th of September now last past, there were funds at the credit of the said Bank in Hamilton sufficient to pay the said bill of exchange, and the said Bank was up to that time in good and solvent circumstances, and duly met all demands against it; and it became and was the duty of the defendant within a reasonable time after the receipt of the said bill of exchange, to present the same for payment at the branch of the said Bank in Hamilton, and to receive the money therefor, and to pay the same over to the plaintiffs; and had the said bill of exchange been so presented within a reasonable time, to wit, at any time between the receipt thereof by the defendant and said 15th day of September last past, on which said last mentioned day the said Bank failed and stopped payment, the said bill of exchange would have been duly paid in the current coin of this Province, or in other lawful money, at the option of the defendant. And the plaintiffs say that the defendant did not during all the time aforesaid nor hath he ever since presented the said bill of exchange to the said Bank, but did neglect and hath neglected so to do, nor did he pay nor hath he paid over the said money to the plaintiffs, although the plaintiffs duly demanded the same from the defendant; whereby and by means of the negligence of the defendant in this behalf, and by means of the said failure of the said Bank, the said bill of exchange became, was, and is worthless and of no value; by means of which said several premises the plaintiffs have lost the

said sum of \$242 aforesaid, and the defendant hath refused and doth now refuse to pay to the plaintiffs the said sum of \$242.

And also for that the defendant, being such Treasurer as in the first count mentioned, received as such Treasurer from the Grammar School Fund for Upper Canada \$242, to and for the use of the plaintiffs, and it became, and was, and is the duty of the defendant as such Treasurer as aforesaid to pay over the said money to the plaintiffs for the use of the plaintiffs, according to the Statute in that behalf, yet the defendant disregarding his duty in that behalf, did not nor would, nor hath he paid the same money to the plaintiffs, or any part thereof, although the plaintiffs duly demanded the same from the defendant, but hath wholly neglected and refused and still doth refuse to do so.

Pleas 1.—Not guilty.

2. That the plaintiffs never demanded the said moneys before the failure of the said Bank.

3. That defendant did not receive the said sum of \$242, for the use of the plaintiffs, as alleged.

5. To the second count, that the said sum of \$242 was received by him through his agent by a draft on the Bank of Upper Canada, the same being one of the chartered Banks of this Province, and that while the said draft remained in his hands apart from his other moneys for the plaintiffs, the said Bank failed and stopped payment as in the first count mentioned; and the defendant has been at all times ready and willing and now is ready and willing to deliver the said draft to the plaintiffs, and has tendered the same to them, but they have refused to accept the same.

Defendant also demurred to both counts. The plaintiffs joined in demurrer and took issue on the pleas.

At the trial the following facts were admitted :—

A draft of the Bank of Upper Canada, dated 9th July, 1866, was sent to defendant, for \$242, on the branch at Hamilton, in favour of the defendant, being plaintiffs' apportionment of Grammar School Funds for the six previous months. This draft remained in the defendant's

possession from the 11th July to the 26th September, when it was transmitted by him to the plaintiffs, with the following letter, they having on the 25th September called for the amount in the defendant's absence :

“ Treasurer's Office, Cayuga, 26th Sept., 1866.

“ DUNCAN FERGUSON, ESQ.,

“ *Treasurer of Caledonia Grammar School, Caledonia.*

“ Dear Sir,—Enclosed I send you the Bank of Upper Canada draft on Hamilton, No. 242, of date 9th July, 1866, for \$242, which was received for the Caledonia Grammar School, and which has been lying in my office for your demand, as usual, since the 11th of that month, the receipt for which I acknowledge :

“ Yours truly,

“ (Signed) AGNEW P. FARRELL.

“ P.S.—I have endorsed the draft to you as formerly.”

The Bank failed on the 15th September.

The plaintiffs returned the draft by this letter :

“ Caledonia, 27th Sept. 1866.

“ A. P. FARRELL, ESQ.,

“ Dear Sir,—I received yours of yesterday, enclosing draft on Bank of Upper Canada for \$242. I am sorry I cannot accept of it as payment of the sum due to the Caledonia Grammar School Trustees from the Upper Canada Grammar School Fund, for the half-year ending 1st July last. I therefore return it enclosed.

“ Please send me your cheque or other current funds for the amount and register the same.

“ I am, dear Sir,

“ Your obed't servant,

“ DUNCAN FERGUSON,

“ *Treasurer for the Joint Board of Grammar
and Common School Trustees.*”

To which the defendant answered by this letter, of the 29th September :

"Treasurer's Office, Cayuga, 29th Sept., 1866.

"DUNCAN FERGUSON, ESQ.,

"Treasurer, Caledonia Grammar School, Caledonia.

"Dear Sir,—I beg to acknowledge your letter of the 27th inst., returning me the draft No. 4267 of the Bank of Upper Canada, on the branch in Hamilton, on Government account, of date 9th July, 1866, for the sum of \$242, received by me from the Caledonia Grammar School, and sent to you in my letter of the 26th inst., in exchange for your receipt of date 25th inst., which was left in my office during my absence from home.

"Allow me to remind you that your Grammar School money is a special fund; that the above-referred-to-draft which you now refuse to accept as heretofore, was good as specie from its date up to the morning of the 15th inst.; that I held it for you since the 11th July last, expecting daily that you would have sent for it, and that however much to be regretted the fact that the draft is now depreciated it does not affect me, as I do not think that I am called upon to uphold the stability of all the chartered Banks in the Province; neither have I the power of paying you the sum demanded out of the County funds, without authority from the County Council. I will lay the matter before that body at their next meeting, and remain,

"Yours truly,

"(Signed) AGNEW P. FARRELL,
"Treasurer."

This was replied to by the plaintiffs by a formal demand made in November, to which the defendant replied by the following letter:

"Treasurer's Office, Cayuga, Nov. 16, 1866.

"D. FERGUSON,

"Treasurer, &c., Caledonia.

"Dear Sir,—I beg to refer you to my letter to you of date 29th Sept. last for my reply to the demand contained in yours of 9th inst., and remain,

"Yours truly,

"(Signed) AGNEW P. FARRELL,
"Treasurer."

The Trustees applied to the Superintendent of Education for the money, but it was refused, on the ground that it has been properly sent in time.

Mr. Farrell was the Treasurer of Haldimand, and was admitted to have received the draft as above. A letter from the Deputy Superintendent of Education of the 19th January, 1867, to the defendant, was also put in, stating, in reply to his letter of the 16th January, that a circular is sent to the Grammar School Trustees, notifying them of payments to the agent of the County Treasurer; and that on the 7th July a circular was addressed to the Chairman of the Board of Grammar School Trustees, Caledonia, advising him of the payment to the defendant's agent of \$242 for that school.

It was admitted that there was no bank agency at Cayuga: that the \$242 was paid by the Education Department to the Bank of Upper Canada at Toronto as agents of defendant, and the draft was transmitted by them to the defendant.

J. R. Martin moved for a nonsuit. He objected that it was not Farrell's money, citing The Municipal Institutions Act, Consol. Stat. U. C. ch. 54, secs. 159, 160, 170, 172, 174, 184, sub-sec. 1:—That these funds belong to the Grammar School Board, and not to the United Board—Grammar School Act, Consol. Stat. U. C. ch. 63, sec. 4, sub-sec. 8, sec. 25, sub-secs. 7, 9:—that the defendant is only a servant of the County Council, and not answerable in an action, as there is no privity of contract.

It was consented that a nonsuit should be entered, with leave to the plaintiffs to move to set it aside, and enter a verdict for the plaintiffs for \$242.

Afterwards a rule *nisi* having been obtained, in pursuance of the leave reserved, the demurrer and rule were argued together.

The learned Judge held that the defendant was responsible for the payment, and liable to this action: that it was properly brought by the plaintiffs, the United Board, sec.

25, sub-sec. 7 of the Grammar School Act providing that the Joint Board shall have the powers of the Trustees of both the Common and Grammar School Boards; that the first count was bad, for if the facts were, as there alleged, that the Education Department paid to defendant the plaintiffs' apportionment of the Grammar School Fund by a draft on the Bank of Upper Canada, there would be no obligation on him to present it, any more than if they had paid him the amount in bills of the Bank; he could not be responsible for the failure of the Bank if he had kept the funds as received by him, subject to the plaintiffs' order.

"Had the facts of the case," the learned Judge added, "been proved as set forth in the first count and in the fifth plea, I think the plaintiffs could not recover, and that the nonsuit entered should stand. But the evidence shews that the defendant by his agent received from the Educational Department of the Government the amount of the plaintiffs' apportionment, not in a Bank draft, but in money. It was probably a very convenient way for the defendant's agent to transmit the money by purchasing a Bank of Upper Canada draft, but whatever risk was incurred by that act the defendant must bear, as his agent's act is in law his own. The defendant's position is one of great hardship, for he seems to have conducted the business as any prudent man ordinarily would have done. He is required by the Government to have an agent at Toronto to receive this money. This imposes on the defendant the risk of the failure of his agent, or the loss of the money in being transmitted. Then there is no Bank agency at the County Town, Cayuga, where the defendant resides, and therefore he could not get the draft conveniently cashed, and it remained in his possession until the failure of the Bank. Although it is a great hardship for the defendant to pay this, yet it would be an equal hardship for the plaintiffs not to receive it. As I think their claim against the defendant is a legal one, I must give effect to it."

Judgment was therefore given for the plaintiffs on demurrer to the second count, and for defendant on demurrer

to the first; and the rule was made absolute to set aside the nonsuit and enter a verdict for the plaintiffs on the second count, with \$242 damages, and for defendant on the first count.

The defendant appealed.

J. R. Martin, for the appellant, cited *Cutten v. Ker*, 16 C. P. 227; *Munson v. Municipality of Collingwood*, 9 C. P. 497; *Smith v. Corporation of Collingwood*, 19 U. C. R. 259.

Harrison, Q.C., contra, cited *Spratt v. Hobhouse*, 4 Bing. 179; *Pickard v. Bankes*, 13 East 20.

[*Boyd*, *Amicus Curie*, referred to *Walsh v. Leahy*, 18 C. P. 48, not then reported.]

The following sections of the Statute were referred to on the argument:—Consol. Stat. U. C., ch. 54, secs. 159, 160, 161, 171, 174, 184; 29-30 Vic., ch. 51, sec. 162; Consol. Stat. U. C. ch. 55, secs. 169, 192, 193, 194, 195, 196; ch. 63, secs. 8, 9, sec. 25, sub-secs. 7, 9; ch. 64, secs. 51, 57, sec. 79, sub-secs. 9, 13, sec. 91; 29 Vic., ch. 23, sec. 5; 23 Vic., ch. 49, sec. 10.

HAGARTY, J., delivered the judgment of the Court.

The money sought to be recovered here was Grammar School money.

On the 7th of July a circular was sent to the Chairman of the Board of Grammar School Trustees from the Education Office, advising him of the payment of \$242 for *that school*. At that time the Grammar School and the Common School were united under the provisions of the Statute, and appear to have had a Joint Treasurer.

The defendant, on the 26th September, 1866, writes to this Treasurer as Treasurer of the Caledonia Grammar School, enclosing him a Bank of Upper Canada draft for this sum, and says "which was received for the Caledonia Grammar School, and which has been lying in my office for your demand, as usual, since the 11th July, the receipt for which I acknowledge. * * I have endorsed the draft to you as formerly."

This money had been paid into the Bank at Toronto for the Treasurer (the defendant) prior to its suspension, and the Bank sent a draft to defendant's order for that sum on their Hamilton agent. Unfortunately this draft was not presented before the stoppage in September, at least two months after its transmission.

It is stated that the plaintiffs never applied for this money till after the stoppage. Then, on the 25th of September, they or their Treasurer called at defendant's office, and left a receipt for the money, he not being there.

On the 29th of September defendant wrote to the plaintiffs' Treasurer. After going over the facts he says, "Your Grammar School money is a special fund. The above referred to draft, which you now refuse to accept as heretofore, was good as specie from its date up to the morning of the 15th inst. I held it for you since the 11th of July last, expecting daily that you would have sent for it."

We have arrived at the conclusion that the action lies against the defendant for this money.

The Statutes present many difficulties, and there is much force in Mr. Martin's argument as to the corporation being the only parties liable to such an action. They are certainly responsible for all moneys received by their Treasurer.

But in the case before us we find the Treasurer receiving this money, or the draft sent to him therefor by his Toronto agent, where the money was really paid to him, and declaring that he had so received it and held it from July onward for the Grammar School Trustees.

If the state of the Statute law throws a doubt over the Treasurer's personal responsibility in an action, the doubt may, we think, disappear as soon as we find him admitting its receipt for this special purpose, and that he holds it for the plaintiffs. This seems at once to do away with the objection of want of privity.

The case of *Welsh v. Leahy* last term in the Common Pleas, not yet reported (*a*), is apparently in favour of the

(*a*) Now reported, 18 C. P. 48.

Treasurer being liable to be sued in a case like the present.

Quin v. The School Trustees (7 U. C. R. 138), in the School Act of 1846, might at first seem in point, but the words used refer, we think, to the Treasurer of the Trustees, not of the County.

There is some difficulty as to the right of the present plaintiff to sue. Is the Joint Board a corporation capable as such of suing?

The Common School Trustees and the Grammar School Trustees continue to be elected and chosen as before, notwithstanding the union, as it is provided that all the members of both corporations shall constitute the Joint Board.

The chief argument in favour of their possessing corporate powers may be drawn from the 23 Vic., ch. 49, sec. 10, giving power to any School Trustee Corporation to sell and convey any school site or property under their corporate seal, and enacting that all sites given for Common School purposes shall vest in such Trustee Corporation for such purpose, "*And in like manner, and for like purpose, it shall be lawful for any United Board of Grammar and Common School Trustees to dispose by sale or otherwise of any school site or school property belonging to the United Board, or to the Grammar School, or Common School Trustees respectively.*"

They would impliedly from this section have the right to hold and sell property, and as the School Trustee Corporation may sell by deed under corporate seal, in like manner the United Board may sell.

The later Act of 1865, ch. 23, sec. 5, would rather point to a mere Joint Board of Management, each corporation continuing just as it was, but all the respective members—elected or chosen for each corporation, not for any joint body—forming the Joint Board; and on dissolution the school property held as possessed by the Joint Board shall be divided or applied to public school purposes as may be agreed on by a majority of the members of *each Trustee Corporation*; and if they fail to agree in six months, then by the Municipal Council.

This later Act in no way seems to repeat the provision of the Act of 1860 as to any sale by the Joint Board, but while it assumes that it may have property, provides for its being disposed of by a majority of the members of each Trustee Corporation, the separate existence being recognized throughout.

In this case the money was, as before noticed, paid to defendant as Grammar School money. So far as we can understand the facts before us, public moneys appropriated for Grammar School purposes, from the "Upper Canada Grammar School Fund," as we find it called throughout the pleadings and evidence. If so, and, as we think, the Grammar School Trustees, notwithstanding the union under the Joint Board, still existed as a separate corporation, it would seem to follow that it should be sued for by and in the name of such corporation.

The union may last one year or ten years, dissoluble at the end of any year. The property real or personal belonging to each corporation when the union was formed would not, we think, cease to be such separate property, and for any injury or trespass to such property, we think the remedy must be sought in the separate corporate name.

We think the learned Judge below has read the 9th sub-section of sec. 25 of the Grammar School Act (Consol. Stat. U. C. ch. 64,) as if it specially referred to the United Board allowed in the preceding sub-sec. 7, whereas it seems to us as merely indicating one of the powers of the Grammar School Trustees defined by sec. 25: sub-sec. 7, enables them to form the union: sub-sec. 8, to supply the Grammar School with books, &c.: sub-sec. 9, "To give the necessary order upon the County Treasurer for the amount of public money to which such school is entitled." This is a general power, as we think, to Grammar School Trustees.

On the whole we find ourselves unable to agree with the learned Judge on this one point, and we think that the rule for setting aside the nonsuit should be discharged.

We cannot refrain from expressing our regret at the expensive litigation that has taken place respecting the small sum really at stake—namely, the difference between

the nominal and the actual value of the claim on the Bank of Upper Canada. A little forbearance amongst the parties interested might have rendered a lawsuit unnecessary.

We have not discussed the point as to the loss on the draft, as we think it clear that the Treasurer received money in Toronto, and has to account therefor in money, and not in the draft by which that money was sent to him by his Toronto agents.

Appeal allowed.

THE GORE BANK V. EATON.

Bills of Exchange—Mortgage as collateral security—Construction—Merger—Pleading.

The defendant owing the plaintiff a large sum on bills of exchange, some overdue some maturing, gave him a mortgage on land, reciting the debt on the bills, and the plaintiffs' agreement to accept further security by way of mortgage, and containing a proviso that it should be void on payment of the bills, and a further proviso that on default of payment for twelve months the plaintiff might, on giving six months' notice, enter and sell the lands. The mortgage also contained a covenant to pay the bills. In an action on such covenant, with counts upon the bills—

Held, 1. That there was clearly no merger of the claim upon the bills.
2. That the proviso as to default and notice applied only to the remedy against the lands.

Defendant in his plea, after setting out the mortgage and proviso, and averring that the plaintiff had not given the six months' notice, concluded, "and so the defendant had not made default before the commencement of this suit. *Held*, that as the notice was unnecessary the plea was not proved.

DECLARATION.—First count. That by deed dated 30th November, 1866, after reciting that defendant owed the plaintiff \$18,000, which was represented by several bills of exchange set forth in a schedule attached, viz. :

	Date.
1. Acceptance.....\$5000.....	Aug. 17, 1866.
2. " 6500.....	" 21, "
3. Draft 1300.....	Oct. 25, "
4. Acceptance..... 1300.....	" 27, "
5. " 1250.....	Nov. 12, "
5. Draft 2650.....	" 26, "

defendant covenanted to pay said bills, but did not pay.

Second, third, fourth, fifth, sixth, and seventh counts, declaring on each of the same bills.

Eighth count, as endorsee of a note of E. B. Wood for \$150.

Ninth count, on defendant's cheque on the Royal Canadian Bank for \$761.

Tenth count. Money lent.

Pleas—1. As to \$12,800 in the first count, being for the three bills first set out, that the deed therein mentioned was a mortgage, dated 30th November, 1866, reciting the debt on the bills, and the agreement by the plaintiffs to accept further security by way of mortgage for payment thereof, and containing a proviso to avoid on payment by defendant of the several bills or renewals thereof, and a further proviso that the mortgagees in default of payment for twelve months might on six months' notice enter, and lease or sell the lands; provided, that until default of payment defendant might have quiet possession: that said three first bills were all due when the mortgage was given: that the plaintiffs had not given defendant the six months' notice mentioned in the proviso before action brought; and so that defendant had not made default in payment before the commencement of this suit.

Second plea, to the three bills lastly mentioned in the first count, setting out the same mortgage and proviso, and that the said bills were all due when the mortgage was made: that six months' notice was not given, and so that defendant hath not made default.

Third plea, to second, third, and fourth counts, setting out the mortgage, and that thereby the causes of action were merged.

Fourth plea to the fifth, sixth, and seventh counts, merger, as in the third plea.

Fifth plea, as to \$75 in the fifth count, that E. B. Wood paid that amount after action brought.

Sixth plea, that defendant did not make the cheque.

Seventh plea, as to \$18,000 in the tenth count (for money lent) agreement to give this mortgage and covenant, which was duly given, whereby the causes of action were extinguished.

Issue was taken.

The case was tried at Woodstock, before Draper, C. J.

The mortgage was put in, and it was admitted to be truly set out on the record. The bills were also produced. The Bank Manager was examined. He said the mortgage was executed at the date, after some weeks negotiation.

For defendant it was objected, that the defendant should have a verdict on the first plea, as proved: that on the second the only material allegation was the six months' notice, and the issue was on the plaintiffs: that on the third, fourth, and seventh pleas the defendant should have a verdict.

The learned Chief Justice directed a verdict for the plaintiffs, with leave to move for a nonsuit on these objections, the Court to draw inferences as a jury.

Anderson obtained a rule to enter a verdict for the defendant on the leave reserved, and why damages should not be reduced to \$761 and \$75 on the sixth and ninth counts, pursuant to leave reserved: that as to the first count, the pleas were proved, and as to the second to the seventh counts inclusive, the claims were merged by deed proved: that as to \$1300, parcel, in the tenth count, it was also merged; and that there was no evidence of money lent on the sixth count.

M. C. Cameron, Q. C., and *Crombie* shewed cause, and *Anderson* supported the rule.

HAGARTY, J., delivered the judgment of the Court.

We find no leave reserved either to enter a verdict for the defendant or to reduce damages.

We see no ground whatever for the defence of merger or extinguishment of the claims on the bills. The mortgage expressly refers to them and is declared to be a further security for payment thereof, and to be void on

their or any renewals thereof being paid. Some of the bills were due, others current, when the mortgage was taken. The idea seemed to be the continuance of dealing on the foot of these bills or renewals of them, and the giving of the mortgage as *further*, not as substituted security.

The Court of Common Pleas last term reviewed the law on this subject in the case of the *Gore Bank v. McWhirter* (a).

In this view the covenant was broken by the non-payment of the bills, and although some were then due we see no reason for holding that therefore the covenant could not apply to them, or that any demand for their payment was necessary before maintaining an action. If it was a further and additional security, a covenant under seal (with security on land) to pay the bills, we do not see how we can superadd the condition that a demand to pay was necessary.

We think the provisions as to twelve months' default and six months' notice apply only to the remedies against the land by entry, lease, sale, &c.; and that there was neither merger nor extinguishment of the simple contract debts.

The only difficulty we have felt is caused by the form of pleading. The pleas were no doubt demurrable, and we understand the defendant now to argue that even if no defence they were proved, and the issues taken on them should be found for defendant.

The first and second pleas, after stating the mortgage and proviso and averring that the plaintiffs had not given the six months' notice, conclude with the averment, "And so the defendant had not made default before the commencement of this suit." The reasons stated on which he avers he did not make default are found to be insufficient to warrant the assertion. Had he pleaded simply that he did not make default in payment of the moneys in said count mentioned, as alleged therein, before commencement of this suit, and the plaintiffs had merely taken issue

(a) Not yet reported.

thereon, without demurring, we are hardly prepared to hold that a finding thereon for plaintiffs would not entitle them to judgment; or, in another form, if he pleaded, "The plaintiffs were bound to give me a six months' notice before suing; they did not give it, and so I was not in default when action brought," and issue thereon, it would, we think, have the same result.

We should be naturally reluctant, if possible, to allow defendant to succeed on such an objection on issues taken on his own defective pleas.

The issue on the pleas to the bills, which assert that thereby the causes of action were merged and extinguished, must, we think, be also disposed of in the plaintiffs' favor.

We think the rule should be discharged.

Rule discharged.

ROBERTSON V. THE CORPORATION OF THE COUNTY
OF WELLINGTON.

Taxes paid to Sheriff—Liability of County—Non-resident land fund.

The plaintiff, in order to prevent his lands from being sold under a Treasurer's warrant for taxes assessed upon them as non-resident lands, paid under protest to the Sheriff the sum claimed, including costs, and then sued the County as for money had and received, to recover back part of the amount, consisting of commutation of statute labour, which he disputed.

Held, that he could not recover, for the Sheriff was not the agent of the defendants, and there was nothing to shew that he had paid it over to their Treasurer.

The non-resident land fund is so far the property of the County that they may be liable for it in such an action.

ACTION upon the common counts, for money paid, money received, &c. Plea.—Never indebted. The parties agreed upon the following

SPECIAL CASE.

1. It is admitted that the Treasurer of the said County of Wellington, by his warrant made in pursuance of Consol.

Stat. U. C., ch. 55, sec. 124, directed to the Sheriff of the said County of Wellington, commanded the said Sheriff to levy upon the following lands, being in the Village of Elora in the said county, consisting of seven lots (setting out the lands,) for the arrear of taxes due thereon, with costs.

2. That said lands were non-resident lands, and the name of the plaintiff is not inserted and does not appear on the assessment roll, either as resident or non-resident.

3. That the total arrears of taxes, including statute labour tax, claimed upon the said lands, with the costs thereon, were as follows: (specifying the sum due on each lot for taxes and costs respectively, amounting in all to \$180.53).

4. That the Sheriff, in pursuance of the said warrant, advertised the said lands for sale on the 31st day of December, 1866, under and according to the provisions of chapters 54 and 55, Consol. Stats. U. C., which sale was postponed from time to time.

5. That under pressure, and to prevent the said lands from being sold as aforesaid, the plaintiff paid under protest to the said Sheriff the said sum of \$180.53.

6. That large portions of the said taxes were made up by commutation of statute labour, such commutation of statute labour being assessed separately against each of the above parcels of land.

7. That the above lands are composed of two blocks, not subdivided by any registered map, but subdivided before the taxes were imposed, by the owners, on a lithograph plan, bearing the numbers mentioned in paragraph one, and offered for sale according to such plan; and that other properties, subdivided in the said map, were sold by the said owners, according to said map, the first block being composed of the first named three lots, and the second block being composed of the other four lots.

8. That each of the said lots were assessed at the sum of \$200 or under, and there was assessed for statute labour against the said lands for the years 1860, 1861, 1862, and 1863, the following sums, namely, (stating the sum assessed

for each lot). Such assessments were against the lands, and not against the person.

"Such assessments were made, or pretended to be made, under the provisions of By-laws Nos. 15, 23, and 31, of the said Municipal Council of the said Village of Elora, which lies in the said County of Wellington. The material parts of which by-laws, so far as this case is concerned, read as follows :—By-law No. 15, passed on the 15th day of April, 1859, respecting statute labour: Whereas it is expedient to provide for the performance of statute labour by such persons as shall not commute therefor, to fix the rate of commutation, and to define and settle other matters having relation to statute labour.

"Be it therefore enacted by the Municipal Corporation of the incorporated Village of Elora, that from and after the passing of this by-law it shall be the duty of the assessor to enter upon the assessment roll, opposite the name of each person assessed, the number of days' statute labour which such person is liable to perform, which said statute labour shall be less by one-third than the number of days required by the assessment law in that behalf. That such statute labour may be commuted at the rate of 62½ cents per day, if such commutation be paid to the collector or Treasurer, on or before the first day in June of each year; but if not so paid, the rate shall be \$1.00 per day. Provided always, that it shall be lawful for the persons assessed to perform their statute labour in person, or by deputy, if the deputy be approved by the pathmaster. That persons not assessed, or whose taxes do not amount to ten shillings, shall be taxed \$2.00 for statute labour, and such statute labour tax shall be payable to the Treasurer or collector on or before the first day of July in each year, unless previous to that time the persons so taxed shall have performed three days' statute labour to the satisfaction of the pathmaster, in lieu of such tax.

"By-law No. 23, passed on the 24th day of March, 1860: To amend By-law No. 15.—Be it enacted by the Municipal Council of the Village of Elora, that By-law No. 15 be

amended by erasing the words 'one-third,' and inserting the words 'one-half' in lieu thereof, in the clause relating to the amount of statute labour.

"By-law No. 31, passed on the 16th day of April, 1857, respecting statute labour, and to repeal By-law No. 15.—Whereas it is expedient to provide for the performance of statute labour by such persons as shall not commute therefor, to fix the rate of commutation, to define and settle other matters having relation to statute labour, and to repeal By-law No. 15.

"Be it therefore enacted by the Municipal Council of Elora, that By-law No. 15 be and the same is hereby repealed: that from and after the passing of this By-law, it shall be the duty of the assessor to enter upon the assessment roll opposite the name of each person assessed the number of days' statute labour which such person is liable to perform, which said statute labour shall be less by one-third than the number of days required by the assessment law in that behalf; that such statute labour may be commuted at the rate of 62½ cents per day, if such commutation be paid to the Treasurer, or to the pathmaster to whom such labour may have been apportioned, on or before the 15th day of June in each year; but if not so paid, the rate shall be \$1.00 per day. Provided always, that it shall be lawful for persons assessed to perform the statute labour in person or by deputy, if such deputy be approved by the pathmaster. That persons not assessed, or whose taxes do not amount to ten shillings, shall be taxed \$2.00 in lieu of statute labour, and such statute labour tax shall have performed three days' statute labour to the satisfaction of the pathmaster in whose division they are resident, in lieu of such tax."

9. That other lands in the said Village of Elora were assessed at the rate mentioned in the said by-laws.

10. No question is raised by the plaintiff as to any other than statute labour tax.

11. The plaintiff did not pay or tender the statute labour tax until he paid the said sum to the Sheriff as aforesaid.

12. If the plaintiff is entitled to recover, the sum for which he is to have judgment is \$50, that being the excess of statute labour and expenses which the plaintiff claims to have paid.

The question for the opinion of the Court is, whether the plaintiff, upon the facts, is entitled to the said sum of \$50 from the defendants.

McMichael and *Snelling* for the plaintiff, cited *Robinson v. Corporation of Stratford*, 23 U. C. R. 99; *Warne v. Coulter*, 25 U. C. R. 177; *Street v. Corporation of Kent*, 11 C. P. 255; *Allan v. Fisher*, 13 C. P. 63.

Harrison, Q. C., contra, cited *Wilson v. Corporation of Huron and Bruce*, 8 U. C. L. J. 135; *Boulton v. Corporations of York and Peel*, 25 U. C. R. 21.

The clauses of the Statute referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the Court.

By sec. 124 of the Assessment Act, (Consol. Stat., U. C. ch. 55), the Treasurer issues his warrant to the Sheriff to levy the arrears. Sec. 126—Thereafter the Treasurer shall receive no payment on account of the sums mentioned in the warrant. Sec. 132—The Sheriff shall, in each case, add to the arrears published a proportionate share of the cost of publication. Sec. 134—Within a month from the sale, the Sheriff shall pay to the Treasurer the money levied. Sec. 144—The Sheriff shall have five per cent. commission on sums collected by him under the warrant.

If we may treat this money paid to the Sheriff as paid over by him to the Treasurer, we think the County Council is liable for moneys so received by him as their officer.

Sec. 196 says, that any person aggrieved by the Treasurer's default may recover from the Corporation the amount due and payable by him as money had and received to his use:

Sec. 154 says that all moneys received by the Treasurer on taxes on non-residents' lands, whether paid directly to

him or levied by the Sheriff, shall constitute a separate fund, to be called "The Non-resident Land Fund" of such County. We think this fund is the property of the County, so far as to make them liable therefor.

If we understand the facts rightly, a considerable portion of the amount paid to the Sheriff is for costs, in addition to the arrears. There is no statement that the Sheriff has ever paid any portion of this money to the Treasurer. If we hold the defendants responsible, it must be on the ground that payment to the Sheriff is payment to them; that the Sheriff is their mere agent, and that it matters not whether he pay their Treasurer or do not pay him.

In *Bamford v. Shuttleworth et al.* (11 A. & E. 930), it was held that the action could not be maintained against a vendor's attorney who had received the deposit money on a sale which proved abortive. Lord Denman held that the defendants received the money as attorneys, to account to their principal, and there was no privity between him and the plaintiff. Coleridge, J., said the payment over was immaterial; the moment the money was in the agent's hands, it was virtually in the principal's hands.

In *Harrington v. Hoggart* (1 B. & Ad. 586), Lord Tenterden says: "There is an essential distinction between the character of an agent and that of a stakeholder. * * * If an agent receive money for his principal, the very instant he receives it, it becomes the money of his principal."

So, in *Sadler v. Evans* (4 Burr. 1986), it was held the action for money paid to Lady Windsor's agent could not be recovered against him; that he received it for her; whether he actually paid it over to her or not, he received it for her. Lord Mansfield said "he kept clear of all payments to third persons, but where it is to a known agent; in which case the action ought to be brought against the principal, unless in special cases, (as under notice or *malâ fide*)."

Now how stands the Sheriff here towards the defendants or their Treasurer?

In *Austin v. The Corporation of Simcoe* (22 U. C. R. 75), the plaintiff sought to recover money he paid on a Sheriff's sale for taxes on lots which, not being liable to assessment, he could not obtain title to. McLean, C. J., said : " There was no contract whatever between the plaintiff and the defendants. The defendants in fact had nothing to do with the sale, and could not control it in any respect. The Treasurer is the person on whom the law throws the duty of collecting such taxes as are shewn to be in arrear by the rolls. * * * The plaintiff's purchase was voluntary, his payment of money was voluntary, and the defendants cannot be held liable for money voluntarily paid to the Sheriff, and by him paid over to the Treasurer of the County, for the benefit of the Township of Fios."

In the present case, we cannot see how the Treasurer or his sureties could be liable for money paid to the Sheriff and not paid over to the Treasurer (apart from any question of neglect in not enforcing payment); and we are inclined to consider this case defective in not averring a receipt by the Treasurer of the money sought to be recovered back.

Judgment for defendants.

CAMPBELL V. McDONELL, MACNAMARA, AND CARSLY.

False imprisonment—Misnomer—Inconsistent defences—Excessive damages.

The plaintiff, Campbell, who lived at Montreal, was arrested at Kingston, upon a warrant reciting that *R. B. Boman* had been charged, &c., for that he, the said — *Campbell* did, &c., and commanding the arrest of the said *R. B. Boman*. The information was against *R. B. Boman*, the name of Campbell having been struck out. In an action for false imprisonment and malicious prosecution, it was proved that the plaintiff was known as Campbell, but carried on business as *R. B. Boman & Co.* At the trial it was objected that the count for malicious prosecution would not lie, there having been no criminal offence charged. This was conceded, and both sides agreeing that it must be trespass or nothing, it was left to the jury to say whether all or any of the defendants were guilty. The jury having found for the plaintiff—

Semle, that the defendants having abandoned all defence under the proceedings before the magistrate, could not afterwards, in term, be permitted to urge that trespass would not lie, as there was an information and warrant, and defendants were not responsible for the magistrate's act in ordering the arrest; but

Held, that the information and warrant could afford no justification, for they were against Boman, not the plaintiff; and though the plaintiff had entered his name as "*R. B. Boman*" in the hotel where he was staying, there was nothing to shew that he had ever represented that to be his name, and he was known to the hotel-keeper and bar-keeper as Campbell.

Held, also, that the evidence, set out below, was sufficient to go to the jury, to connect all the defendants with the arrest.

The plaintiff when arrested was bailed to appear next morning, and the case was then dropped. The jury having given \$500, the Court refused to interfere for excessive damages.

DECLARATION. First count. Malicious prosecution; charging the plaintiff before a Justice of the Peace with obtaining money on false pretences, and procuring the Justice to issue his warrant, &c., on which the plaintiff was arrested and brought before another Justice of the Peace, by whom the charge was dismissed.

Second count. For trespass and false imprisonment, and forcing the plaintiff to procure bail to appear before a Justice of the Peace, on a charge of having by false pretences obtained money from one A. McDonell.

Plea, by each defendant, separately, Not guilty.

The case was tried at Kingston, before Hagarty, J.

William Allen, an alderman, swore that the defendant McDonell applied to him about granting a warrant, and he went with him to the defendant Carsley's shop, where he found the defendants Carsley and Macnamara, in the

evening : that Macnamara, who was a lawyer, had the documents ready when he went there, and a policeman was also there : that he took the information, and gave a warrant to the policeman, or to Macnamara, who gave it to the policeman. Macnamara read over both the warrant and the information, and said it was all right. The witness said he supposed it was the plaintiff they wanted to arrest, from what they said. Witness had, when first spoken to, referred the party applying to the Police Magistrate, but he said the latter was out of town. Witness said he issued the warrant on the understanding that the plaintiff was to be detained till tried by the Police Magistrate ; the parties seemed in a hurry.

The information was by the defendant McDonell, and stated that R. B. Boman (Campbell struck out) "did by false pretences, and falsely pretending to make me sole agent for the sale of his sewing machines, obtain the sum of fifty-one dollars."

The warrant to the high constable, &c., recited that "whereas Mr. R. B. Boman" (Campbell struck out) "has this day been charged upon oath before the undersigned," &c., "for that he, the said — Campbell, did by false pretences, and falsely pretending to make one Alexander B. McDonell the sole agent for the sale of sewing machines sold by him, obtain from him the sum of fifty-one dollars. These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said Mr. R. B. Boman," (Campbell struck out) "and to bring him before me," &c.

It was proved that the plaintiff lived in Montreal, and was known as Campbell, but did business in sewing machines as R. B. Boman & Co. ; and that he had agents for these machines in several towns. He was stopping at an hotel in Kingston, and on the afternoon of his arrest the defendants McDonell and Carsley, at different times, or together as one witness said, were at the hotel. McDonell first saw him, and used some threats as to being even with him for something he had done. Carsley apparently, afterwards, the same evening, was there, and had a dispute with the

plaintiff, and as he went said "I'll nail you." After that his clerk came, and asked for the plaintiff's name. The bar-keeper swore that they only knew the plaintiff as Campbell.

One Robb, sergeant of police, swore that he was sent for, and went to McDonell's shop, who complained of the plaintiff's conduct. Witness told him he could not arrest without a warrant, and told him to take legal advice; he said he had done so. Later, McDonell and Macnamara came to the station-house, and spoke about arresting the plaintiff, and wanted witness to arrest him without a warrant. He said if they got a warrant he would act, and he gave Macnamara a blank information. After this the plaintiff was brought to the station-house a prisoner. He was bailed to appear next morning, when the case was dismissed or dropped.

Constable Twigg said he got the warrant that evening from the defendant McDonell to give to Constable McAulay, who, with the witness, arrested the plaintiff.

McAulay swore he was at Carsley's store; that all three defendants were there, talking of arresting the plaintiff; he knew from what they said the warrant was being made out. Witness had previously gone to the plaintiff's hotel, and was shewn the name in the book, "R. B. Boman." This witness was a detective. He said McDonell and Macnamara first applied to him in the matter; that constable Twigg gave him the warrant, the witness having sent him to McDonell for it. He had heard both McDonell and Carsley complain that the plaintiff had cheated them; no instructions were given to him except what were contained in the warrant. When the plaintiff was arrested, he said, looking at the warrant, that was not his name. Witness told him he was registered at the hotel as R. B. Boman; he said, in doing business he went under the name of the company. Witness said he thought a clerk of Carsley's pointed out the plaintiff to him to arrest.

It was proved that the warrant and information, in their present state, were in the defendant Macnamara's writing;

and that next morning, when the charge was dismissed, Carsley came afterwards, saying he came as a witness in the case.

It was objected for the defence that the first count was not supported, as no criminal offence was charged, and therefore the last count (trespass) only was in question, and no case of trespass proved on it; and that there was no evidence against Carsley; and a verdict was claimed on the first count.

All parties agreed that it was either trespass or nothing, and the jury were asked whether, on all the evidence, they found all or any of the defendants to be the moving parties to the trespass on the plaintiff; the learned Judge asking whether they directly caused, procured, or commanded his arrest, immediately causing the same, treating it as a trespass.

This was also objected to generally. The jury found for the defendants on the first count, and for the plaintiff on the second count, with \$500 damages.

Gwynne, Q. C., obtained a rule to set aside the verdict on the law and evidence, on the grounds, that no joint or separate act of trespass was proved; that the arrest was under a warrant on information duly taken, and trespass would not lie; and for misdirection, in charging that there was sufficient evidence, when there was none; and for excessive damages; and as to Carsley on affidavits.

The affidavits were, as to Carsley, his own, denying his participation in the arrest, and stating that the other defendants met at his office to ascertain where the plaintiff could be found; that he did not use the language at the hotel which was sworn to; and he could prove at another trial that he took no part when they were at his place, and that he only knew the plaintiff as Boman.

On the other side it was sworn that the defendant Carsley specially agreed at the close of the plaintiff's case, with the other defendants, to call no witnesses.

Anderson shewed cause, citing *West v. Smallwood*, 3 M. & W. 418; *Cooper v. Harding*, 7 Q. B. 928; *Chivers v.*

Savage, 5 E. & B. 697; *Rafael v. Verelst*, W. Bl. 983, 1055; *Carratt v. Morley*, 1 Q. B. 18; *Finch v. Cocken*, 2 C. M. & R. 196, 5 Tyr. 774; *Green v. Elgie*, 5 Q. B. 99; *Harris v. Dignum*, 29 L. J. Ex. 23, 5 H. & N. 943, Am. Ed.; *Edgell v. Francis*, 1 Scott N. R. 121; *Mayne on Damages*, 348.

Gwynne, Q. C., for defendants McDonell and Macnamara, and Mackenzie, Q. C., for defendant Carsley, supported the rule, and cited *Codrington v. Lloyd*, 8 A. & E. 453; *Collins v. Evans*, 5 Q. B. 820; *Barber v. Rollinson*, 1 C. & M. 330; *Pennell v. Dawson*, 18 C. B. 355; *Chambers v. Robinson*, Str. 691; *Wicks v. Fentham*, 4 T. R. 247; *Avery v. Bowden*, 6 E. & B. 972, *Wheelton v. Hardisty*, 8 E. & B. 262.

HAGARTY, J., delivered the judgment of the Court.

The defendants have completely shifted the ground taken at the trial. Then they insisted that the count for malicious prosecution must fail, as there was no legal charge made; that the information and warrant shewed no criminal offence, and that the trespass count only could be in question. The plaintiff's counsel acceded to this view, and there seemed a unanimity of opinion that the case was trespass or nothing. And it was laboured to shew that the defendants, or some of them, took no part in the actual arrest.

In term, the weight of the argument urged forcibly by Mr. Gwynne (who was not at the trial), is, that trespass was out of the question, as there was an information and warrant, and that none of the defendants could be responsible for the decision of the magistrate who ordered the arrest.

The objection at the trial conceded that there was no criminal charge shewn, and therefore no malicious prosecution; the plaintiff accedes to that view, and ceases to press the first count; and all agree to go to the jury on the point of trespass or no trespass; and a verdict is obtained for the defendants on the first count.

Now this course is not very consistent, and operates unfairly on the plaintiff. Had the defendants not conceded the total illegality of the magisterial proceedings, and

had they attempted to shield themselves thereunder, the plaintiff could have pressed the charge of maliciously and without probable cause setting the law in motion to his prejudice.

We feel great difficulty in holding that such a course can be allowed. If we give way to Mr. Gwynne's argument in term, we must sanction as correct the course of expressly giving up a line of defence at *Nisi Prius* as untenable, and letting the opposite party act on such surrender, and abandon one line of attack, especially aimed at such supposed defence, and obtain a verdict for the defence as to that line, and then in term fall back on, or rather reopen, such line of defence, and insist that the attack so abandoned was the only form in which the plaintiff could succeed.

This seems to be the present state of the case.

But if it be now open to the defendants to claim the protection of the magistrate's action, could they successfully do so? It was freely conceded that the plaintiff had not committed any criminal offence; and the information is, that Boman, by false pretences, and by falsely pretending to make McDonell sole agent for the sale of his (plaintiff's) sewing machines, obtained \$51 from him, not even adding with intent to defraud. It is not easy to conceive how this could be a false pretence of any existing fact. Intending everything in favour of the defendants, and that they told the magistrate the truth, and that it was his mistake to consider it a criminal offence, or that perhaps it is possible to conceive a state of facts to present a criminal charge, then we find him issuing a warrant bad, as we think, on its face. It is to arrest Boman, because he, Boman, had been charged on oath, for that he, Campbell, had obtained money on false pretences.

If we hold defendants not liable for anything done by the magistrate in issuing the warrant, then comes the further difficulty—the information is against Boman, and the warrant, also, to arrest Boman. Is this a justification for arresting Campbell?

In *Cole v. Hindson* (6 T. R. 234), Lord Kenyon says :—
“ Defendants were not justified in seizing goods of Aquila Cole under a distringas against Richard Cole; and the averment in the plea that Aquila and Richard are the same person will not assist them, as they have not also averred that the plaintiff was known as well by the one name as by the other.”

Shadgett v. Clipson (8 East 328), was an action of trespass, with a justification shewing an arrest under a writ against Josiah C. Shadgett, therein called John Shadgett, averring they were the same person. It was held the arrest could not be justified, and there was no averment that the plaintiff was known as well by one name as the other.

In *Scandover v. Warne* (2 Camp. 270), the same question arose. Lord Ellenborough said :—“ I cannot hear that instead of A. B., mentioned in a writ, it was meant that the Sheriff should arrest X. Y.”

In *Finch v. Cocken* (2 C. M. & R. 196), a *capias* issued against the defendant, William Cocken, by the name of William Cocker. He was arrested, and signed a bail bond as William Cocken, sued and arrested by the name of Cocker. The identity was admitted. Parke, B., says :
“ If the writ issued in a different name, it must be averred that he was as well known by one name as the other.”
Lord Abinger said : “ If, because the modern Acts have disposed of the plea in abatement, both in civil and criminal process, we were to infer that a Sheriff or police officer may arrest with impunity a person whose name is not in the warrant, we should make a most violent alteration in the law of arrest.”

Morgans v. Bridges (1 B. & Al. 647), was an action against the Sheriff for permitting one Godfrey Barnett, arrested on *mesne* process, to escape. The Sheriff had arrested the person pointed out to him. On enquiry, he found it was Maurice Barnett, Godfrey's brother. Maurice had contracted the debt, and had then described himself as Godfrey. The Sheriff refused to detain him, and he was

held not liable in damages. Lord Ellenborough said: "Where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it; for a mistake induced by his own affirmation cannot give him a right of action." They considered that the Sheriff might but was not bound to detain him. Holroyd, J., says: "Upon an issue between Maurice Barnett and the plaintiff, if the question was whether Maurice was known by the name of Godfrey, the circumstance of his having given his name as Godfrey would be sufficient to decide that issue against him; but as between any other person and the plaintiff, the using of the name upon one occasion only would not justify such a conclusion."

There was no evidence in the present case of any assertion by the plaintiff of his name being Boman. He had apparently entered it so in the hotel book, but he was known to the hotel-keeper and bar-keeper as Campbell. He gave certificates to Carsley and McDonell under the business name of Boman & Co. (a), and stated to another that he, when doing business, went under the name of this Company. We do not see what right, derived from any act of the plaintiff, they had to assume his name to be Boman.

It is evident from the information and warrant in Macnamara's writing, that defendants had doubts of his true name, from their using both names, Boman and Campbell. An enquiry from the hotel people would have cleared up the doubt.

If defendants had insisted on a defence under the information and warrant, the jury could have been asked to

(a) NOTE.—The certificate read thus: "This certificate of agency witnesseth that Mr. S. Carsley is our duly authorized agent for the sale of the Universal Family Sewing Machine. Given this 5th day of September, A.D. 1867.

R. B. BOMAN & CO.,
Universal S. M. Company.

find if the plaintiff had been known under or used the name of Boman, so as to be known by it, with remarks unfavourable to him if in dealing with these defendants he directly or indirectly represented himself as called Boman, so as to bring it under the passage quoted from Mr. Justice Holroyd's judgment. But as the evidence seems to disclose no representations, direct or indirect, by the plaintiff to defendants of his name being Boman, we hardly see how the jury could properly find against him on that point.

All this was given up. Defendants' counsel at the trial seemed to have satisfied themselves that they could not maintain a defence under the magisterial proceedings, and thought it better perhaps to admit that the whole proceeding was a mistake on defendants' part as to their right to proceed against the plaintiff for a criminal charge.

With the many difficulties in their way this was not an unnatural course to take, and they elected to take a verdict in their favour as to the malicious prosecution, and chose to go to the jury on the narrower ground, whether they were or were not legally connected with the plaintiff's arrest as trespassers.

We are not prepared to hold that they can now fall back on this abandoned objection. Such a course, if allowed, would be to lay a trap for a plaintiff who framed his case in the double form, treating the magistrate's proceedings as valid. Defendants admit their invalidity, and therefore he does not press that form of action. We do not think there was any intention at the trial to lay any such trap, as we believe defendants fully believed the proceedings were wholly untenable, and our very strong impression is that their belief in this respect was quite correct.

If the proceedings so taken were untenable, then are they connected with the trespass?

Defendant McDonell was a directly moving cause of the arrest, and personally gave the warrant to constable Twigg, who with McAulay arrested the plaintiff. Macnamara drew up all the papers, and went with McDonell to the constable, urging him to arrest the plaintiff without a warrant

shortly before it was obtained. As to Carsley, it was proved by McAulay that at his own store he and the other two were together talking about arresting the plaintiff, and he knew from what they said that the warrant was being made out. The Justice said that he went with McDonell at his request to Carsley's store, where Macnamara had the papers ready, and said all was right. He afterwards, on cross-examination, said he was not certain about Carsley's identity. Again, not very long before this, on that afternoon, Carsley was heard using high words with the plaintiff at the hotel, and as he went away said, "I'll nail you."

We think this was sufficient legal evidence for the jury to find, as they did, that all three were acting together in procuring the plaintiff to be arrested by the police, and that the arrest was directly procured or commanded by them.

As to Carsley's affidavit, it merely amounts to this, that he had evidence which he did not choose to produce at the trial.

As to the damages, we are not prepared to say that they are excessive, for the utterly groundless arrest and imprisonment, although for a very short time, of an innocent man, by the joint action and procurement of these three defendants. They are not so large as to induce the belief that the jury acted from improper motives.

The suggestion that they gave this sum to ensure that defendants should have to pay the costs, is capable of being used rather against the defendants, as an evidence that the jury were resolved to give substantial damages, and that in addition the defendants should pay full costs.

We think the rule must be discharged.

Rule discharged.

PECK V. MCDUGALL.

Division Court—Examination of defendant—Commitment—Pleading—Practice.

The plaintiffs demurred to the replication to a plea justifying an arrest under an order to commit, issued by a Division Court for disobedience of an order to pay a judgment debt within a named time. Defendants joined in demurrer and excepted to the plea.

Held, as to the plea—1. That it was unnecessary to state the proceedings before judgment, so as to give the Division Court jurisdiction, the amount stated being clearly within it.

2. That the issue of execution in due course, and its delivery to the plaintiff and return, were sufficiently stated.

Seem, that the issue and return of execution is not, under the Division Courts Act, a condition precedent to the examination of defendant.

It was alleged that when the summons to examine issued the plaintiff resided in the county, but not that he continued so resident at the issue of the summons to commit. *Held*, sufficient, for this would be presumed.

It was not averred that the plaintiff was examined on oath before the Judge, or any other evidence adduced. The warrant, set out in the replication, recited that it appeared to the satisfaction of the Judge that he had contracted the debt under false pretences. *Held* sufficient, for it is not necessary in all cases to take evidence on oath, and the Judge might have acted on the plaintiff's admission.

Seem, that the omission of the Clerk to enter an order of commitment in the procedure book, could not affect a defence under such warrant.

Held also, that the Judge had power to make an order to pay in nine weeks or for commitment on default; and as a summons and order to commit issued before the plaintiff's arrest, it was immaterial that the first order had not been entered, or that three months had elapsed after it before the warrant issued.

The order to pay or for commitment issued in May. In October, on the return of a summons, an order was made to commit for non-appearance and disobedience of the order to pay. The warrant of commitment recited that the order of May issued because it appeared to the satisfaction of the Judge that the plaintiff had incurred the debt under false pretences, and that on the return of the summons in October he had not appeared.

Held, that the ground of commitment sufficiently appeared.

DECLARATION for false imprisonment.

PLEA. That before the alleged trespass, to wit, on the 22nd of October, 1864, the defendant recovered judgment against the plaintiff in the Seventh Division Court of the United Counties of Huron and Bruce, for the sum of \$50.84, for debt, and \$3.30 for costs, and thereupon, the said judgment remaining in full force and unsatisfied, the defendant in due course of law, and by the judgment of the said Court upon said judgment so recovered as aforesaid, issued a

warrant of execution against the goods and chattels of the plaintiff, directed to one T., then being a bailiff of the First Division Court of the said United Counties of H. & B., within which Division the said plaintiff then resided, commanding him, &c., (setting out the warrant) which said warrant was subsequently, to wit on the 2nd of May, 1865, returned *nulla bona*.

That thereupon, the said judgment still remaining in full force and unsatisfied, and the said plaintiff then being a resident in the said County of Huron, the said defendant, on the 6th of May in the year last aforesaid, sued out of the said Seventh Division Court upon the said judgment a summons to examine the said plaintiff at a time and place therein named, pursuant to the Statute in such case made and provided, which said summons was on the 15th of May, in the year last aforesaid, duly served on the said Leonard Peck; that on the return thereof, to wit at the village of Bay-field, in the County of Huron aforesaid, as therein mentioned, on the 31st day of May, in the year last aforesaid, the said plaintiff being then present in obedience to said summons, by the award and order of R. C., Esquire, Judge of the said Division Court, then presiding in the said Seventh Division Court, an order indorsed on said summons was made by the said Judge in the words and figures following, that is to say, "The defendant being present is ordered to pay in full in nine weeks from the date hereof, or in default of payment to be committed for 30 days in the common gaol. Dated this 31st day of May, 1865.

(Signed) R. COOPER."

That on the 16th of September in the year last aforesaid, the said judgment still remaining in full force and unsatisfied, the said plaintiff sued out of the said Seventh Division Court upon the said judgment a summons, under the seal of the said Court, returnable on the 9th of October, in the year last aforesaid, directed to the said plaintiff, to shew cause why pursuant to the said order he, the said plaintiff, should not be committed to the common gaol of the said United Counties of Huron and Bruce, for not complying

with the said order to pay in full in nine weeks or be committed to the Common Gaol for thirty days, which said order was duly served on the said plaintiff, Peck, on the 29th of September, in the year last aforesaid.

That upon the 9th of October, in the year last aforesaid, John Beil Gordon, Esquire, then being a barrister of Upper Canada, and then presiding in said Seventh Division Court as Deputy Judge, having been pursuant to the Statute in such case made and provided duly appointed so to act by the said R. C., he being then ill or unavoidably absent, at the request of the said plaintiff enlarged said summons until the holding of the next Seventh Division Court.

That upon the next holding of said Seventh Division Court, that is to say, on the 4th of December, in the year last aforesaid, the said Judgment still remaining in full force and unsatisfied, the said Leonard Peck did not appear in pursuance of said summons, or allege any sufficient reason for not attending, or shew any cause why he should not be committed to the said gaol, whereupon the said R. C., as such Judge as aforesaid, endorsed upon the said summons an order for the committal of the said Leonard Peck, in the words and figures following, that is to say, "Order for committal for thirty days for non-appearance and disobedience of order. Dated the 4th day of December, 1865.

R. COOPER, *Judge.*"

And thereupon, to wit on, &c., and under and by virtue of a warrant of commitment duly issued by and upon the authority of said order, and under the seal of said Court, and pursuant to the Statute in such case made and provided, upon said Judgment, directed to the said T., then being a bailiff of said First Division Court, commanding him to take and deliver the said plaintiff to the gaoler of the common gaol of the said United Counties, who was thereby required to receive the said plaintiff, and him safely keep in the said common gaol for the term of thirty days from the arrest under said warrant, or until he should be sooner discharged by due course of law, the said order to commit and the said warrant of commitment being in

full force and unrescinded, he, the said T., as such bailiff, by virtue of the said warrant of commitment took the said plaintiff, and delivered him into the custody of the said gaoler of the said common gaol, which is the alleged trespass.

Rep'ication. That before the committing of the trespasses in the declaration mentioned, and before the commencement of this suit, the defendant, on a judgment alleged to have been recovered against the plaintiff in the Seventh Division Court for the United Counties of Huron and Bruce, by application under his hand requested the clerk of the said last mentioned Court to summon the said plaintiff to answer according to the Statute in that behalf touching such judgment debt in the said Court against the plaintiff: that on the sixth day of May, A. D. 1865, the clerk of the said Division Court, in pursuance of the said request of the defendant, issued under his hand and the seal of the said Court a certain judgment summons against the said plaintiff, at the suit of the said defendant, in the words and figures following, that is to say, &c., (setting out the judgment summons verbatim, returnable on the 31st May):

That on the said 31st of May, at the village of Bayfield, the said plaintiff appeared before the Judge presiding at the sittings of the said Division Court then held, ready and willing to be examined according to the Statute in that behalf and the exigency of the said summons: that the said Judge before whom the said summons came on for hearing did not examine the said plaintiff according to the Statute in that behalf, although he was ready and willing to be examined; and without any witnesses being examined on oath before him on said last mentioned day touching the subject matter of said judgment summons, made an order, endorsed on the said judgment summons, in the words and figures following, (setting it out):

That on or about the said 31st of May last aforesaid the clerk of the said Division Court entered in the procedure book of the said Court, the same being a book kept by the said clerk under the provisions of rule No. 4 of the rules

of the Upper Canada Division Courts, the said order for the commitment of the plaintiff for the term of thirty days aforesaid, according to the Statute and rule of the Division Courts in that behalf duly made according to the provisions of the Division Courts Acts for Upper Canada: that more than three calendar months from the entry of the said order for commitment as aforesaid in said proceeding book of the said Division Court for the plaintiff's committal as aforesaid, to wit, on the 16th of September, 1865, the said defendant, acting on the said supposed judgment, caused a certain proceeding to be taken against the plaintiff, by causing to be issued a summons in the words and figures following, (setting out the summons to commit, returnable on the 9th October):

That on the said ninth day of October, the said plaintiff appeared on the said supposed summons before John Bell Gordon, Esquire, presiding in said Division Court as Deputy Judge, when the said summons was at the request of the plaintiff adjourned until the next sittings of the said Division Court, when, in the absence of the plaintiff, the Judge of the said Court then presiding made the following order, indorsed on said summons, (setting out the order of commitment):

Whereupon the said defendant, on or about the 4th of December, 1865, caused a warrant of commitment to be issued against the now plaintiff, which was in the words and figures following:

WARRANT OF COMMITMENT.

In the Seventh Division Court for the United Counties of Huron and Bruce.

No. 147, A. D. 1865. Between PETER A. MCDUGALL, plaintiff, and LEONARD PECK, defendant.

To Bernard Trainor, bailiff of the First Division Court, and to all constables and peace officers of the United Counties of Huron and Bruce, and the jailer of the common jail for the said United Counties.

Whereas, at the sittings of this Court holden at the village of Bayfield in the County of Huron, on the 22nd day of October, 1864, the above named plaintiff, by

the judgment of the said Court, in a certain suit wherein the Court had jurisdiction, recovered against the above named defendant the sum of \$54.14 for his debt and costs, which were ordered to be paid at a day now past. And whereas, the defendant not having made such payment, upon application of the plaintiff a summons was duly issued from and out of this Court against the said defendant, by which said summons the defendant was required to appear at the sittings of this Court holden at the village of Bayfield aforesaid, on the 31st of May, 1865, to answer such questions as might be put to him touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectations he then had, and as to the property and means he still has of discharging the said debt, and as to the disposal he may have made of any of his property. And whereas the defendant having duly appeared at the said Court pursuant to the said summons, was examined touching the said matters; and whereas it appeared on such examination to the satisfaction of the Judge of the said Court, that Leonard Peck, the defendant, incurred the debt the subject of this action under false pretences; and then thereupon the said Judge ordered the defendant to pay the claim and costs in full in nine weeks or be committed to the common jail for thirty days. And whereas the said defendant did not pay as ordered, and upon application of the plaintiff on the 16th day of September, 1865, a summons to shew cause was duly issued out of this Court, and served upon the defendant, requiring him to appear at the Court to be holden on the 9th of October, 1865, and on application of the defendant, and by consent of the Court, the time was enlarged to the 4th day of December, 1865.

And whereas on the said 4th day of December, 1865, the defendant did not appear as required, nor allege any cause for not so appearing.

Thereupon it was ordered by the said Judge that the said defendant should be committed for the term of thirty days to the common jail of the said United Counties, according to the form of the Statute in that behalf, or until he should be discharged by due course of law.

These are therefore to require you, the said bailiff and others, to take the said defendant and to deliver him to the jailer of the common jail of the said United Counties,

and you, the said jailer, are hereby required to receive the said defendant, and him safely keep in the said common jail for the term of thirty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, according to the provisions of the Act of Parliament in that behalf, for which this shall be your sufficient warrant.

Given under the seal of the Court, this 4th day of December, 1865.

(Signed) D. H. RITCHIE, *Clerk.* [L. S.].

That the said defendant caused the said warrant of commitment to be delivered to the said Bernard Trainor, who took and arrested the said plaintiff and conveyed him to the said jail, and delivered him to the keeper thereof, and the plaintiff was detained in prison on said warrant for the space of thirty days, which are the same trespasses in the declaration mentioned.

To this replication the defendant demurred, as being no answer.

The plaintiff joined in demurrer, and excepted to the plea on various grounds, which are sufficiently stated in the judgment.

C. Robinson, Q. C., for the defendant, cited *Baird v. Story*, 23 U. C. R. 624; *Bullen v. Moodie*, 13 C. P. 126; *Tay. Ev.* 5th Ed., p. 1405-8; Division Courts Act, Consol. Stat. U.C. ch. 19, secs. 160-168.

John Paterson, contra.

HAGARTY, J., delivered the judgment of the Court.

The first objection is, that the plea does not shew the necessary proceedings before judgment, or facts to give the Division Court jurisdiction. 2. That it is not shewn that the necessary time elapsed between the entry of judgment and issue of execution, nor any order for immediate execution, nor that the execution was under seal. 3. That the warrant against goods should have been directed to a bailiff of the Seventh Division Court, and no proper return was made thereto.

We think the judgment is sufficiently stated, and that the prior proceedings need not be set out. We think that when it is stated that the judgment was for a debt in amount clearly within the statutable jurisdiction, we may assume it to be sufficient on exceptions, as these are, to a prior pleading.

The warrant, which the plaintiff sets out in full in his replication, expressly avers that the judgment was recovered "in a certain suit wherein the Court had jurisdiction."

As to the lapse of time before execution, we think it sufficiently pleaded that the execution issued on the judgment in due course of law, and that the delivery of the execution to the bailiff of the first Division Court of the County, within whose division the plaintiff then resided (as averred), and the return thereto, are sufficient.

Sec. 79, speaks of bailiffs executing all warrants, orders, and writs, delivered to them by the clerk for service, whether bailiffs of the Court out of which the same issued or not, and directs that they shall so soon as served return the same to the clerk of the Court of which they are respectively bailiffs.

The objection in the form in which it is taken cannot, we think, prevail; and it may not be necessary to discuss it, as the clauses allowing the examination of a defendant do not seem to make the issue and return of an execution a condition precedent, but merely say, "any party having an unsatisfied judgment or order in any Division Court, for the payment of any debt, damages or costs," may procure a summons, &c.—Sec. 160.

The fifth objection is, that it is not shewn that when the summons of the 16th of September was issued, served or returnable, the plaintiff lived or carried on business in the Counties of Huron and Bruce, under section 160.

To this the defendant answers, that he does aver that when the first summons of the 6th of May was issued the plaintiff was a resident of the county, and that till the contrary is shewn he will be presumed to have continued so resident. We think this answer sufficient.

The 9th, 10th, and 11th objections were not seriously pressed, and need not be noticed. Section 170 gives very wide powers as to orders for payment.

The fourth objection is, that the plea does not allege that the plaintiff was examined on oath, nor any other evidence adduced before the Judge. The words of the Statute, section 165, are, "If it appears to the satisfaction of the Judge that the party had when summoned, or since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages," &c.

Now here the warrant professes to commit the plaintiff because it appeared to the satisfaction of the Judge that the plaintiff had contracted the debt under false pretences. We are not prepared to hold that it would be absolutely necessary in all cases to take evidence on oath. We can readily suppose a case in which, when a debtor is brought up for examination, a writing purporting to be signed by him might be produced, which, if genuine, clearly proved by his own admissions that he had contracted the debt by false pretences, or that he had done something of which his creditor accuses him, or shewing that he had abundant means to pay if he pleased. If the Judge shewed him the writing, and he then admitted he had written it, and did not explain it or ask to be examined on oath, (which his replication does not assert) to explain or contradict, we do not see why the Judge might not accept and act on his admission, as he might in dealing with any admissions made in Court on the trial of the suit between him and his creditor. We do not lay down any rule of general application on this point, we merely take the case as it appears in the pleadings.

We think this objection fails.

The sixth objection is, that the plea does not shew that any order for commitment was ever entered in a book prescribed by rule of the Division Courts to be kept by the clerk, called a Procedure Book; and the replication avers that the order of the 31st May was then entered in the procedure book, and that more than three calendar months

thereafter the plaintiff issued the summons of September 16th.

Sec. 42 of the Statute, directs the clerk to note all summonses, orders, judgments, &c., in a book, which is made evidence in certain cases.

And rule 55 of the rules made under the Statute, says that, "Warrants for commitment, whenever issued, shall bear date on the day on which the *order* for commitment was entered in the procedure book, and shall continue in force for three calendar months from such date, and no longer; but no *order* for commitment shall be drawn up or served."

Were it necessary to decide the point, we should hesitate before we should hold that the omission of the clerk to enter an order of commitment in the procedure book, destroyed the validity of the warrant, and made the party applying for it a trespasser. It seems, however, quite unnecessary on these pleadings to decide such a point.

On the 31st of May the plaintiff was ordered to pay in nine weeks, or be committed for thirty days. This order was duly entered. We think the Judge, under the wide powers of the Act, especially in section 170, had power to make an order to pay in that time. There was no attempt made to enforce that order without further opportunity to shew cause being given to the plaintiff.

On the 16th of September, the summons to shew cause was issued for non-compliance with the former order, and on the 9th of October the plaintiff appeared thereto and obtained an enlargement to the next sittings of the Court, when, as he did not appear or shew cause, an order was made for his committal for non-appearance and disobedience of order.

There is no averment that this order was not duly entered in the procedure book, and the objection as to the lapse of three months from the order of May falls to the ground; nor can we hold it necessary that the plea should aver that it was so entered. In this view the eighth objection also fails, as to the order of May having expired.

The remaining objection is the seventh, that the order and warrant do not sufficiently shew the grounds of commitment, nor on which of the said orders the warrant was issued, and that if on the order of May the grounds of committal do not conform thereto.

We think the objection fails. The warrant recites the order of May, and that it appeared to the satisfaction of the Judge that the plaintiff had contracted the debt on false pretences, and therefore there was an order to pay in a given time or be committed. That payment was not made, and the summons to shew cause issued in September, and the default to appear thereon.

Judgment for defendant.

THE DESJARDINS CANAL COMPANY V. THE GREAT
WESTERN RAILWAY COMPANY.

Desjardins Canal—Railway bridge over.

Held, that by the various Acts of Parliament referring thereto, the erection of the defendants' drawbridge over the Desjardins Canal was sanctioned and recognized; and that it must be assumed to have been lawfully erected, though the formalities required by secs. 136, 137, and 138, of *The Railway Act* might not have been complied with.

Held, also, that the first count of the declaration, charging defendants with neglect and refusal to open the bridge and permit vessels to enter or leave the canal, was defective in not alleging that it was not at such times being actually used by defendants for the passage of their trains; and that the second count was good.

DECLARATION. First count.—That the plaintiffs are a corporation, incorporated by Act of Parliament, and the owners of the canal leading from the Town of Dundas, in the said County of Wentworth, to the waters of Burlington Bay, which said canal is called and known as the Desjardins Canal; and the plaintiffs, as such owners as aforesaid, are by law entitled to demand, receive, and collect tolls from all persons passing and re-passing on and along the said canal with their schooners, boats, and other vessels;

and the said defendants are a corporation, incorporated by Acts of Parliament, and the owners of the line of railway leading through the Province of Canada from the Niagara River to the Detroit River.

That the plaintiffs' works had been constructed, and the canal from the said Town of Dundas to the said Burlington Bay was used by the public, and tolls were collected thereon by plaintiffs for more than twenty years before the said defendants commenced the construction of their said line of railway.

That the said defendants in the construction of their said railway were obliged to carry the same across the works and canal of the plaintiffs, and by agreement duly made and entered into between the said plaintiffs and defendants the course of the said plaintiffs' canal was, for the mutual benefit of both said plaintiffs and defendants, changed from the old channel to the present course through Burlington Heights.

That at the point where the works and railway of the defendants cross the works and canal of the plaintiffs, being at the said Burlington Heights, in the County of Wentworth, the defendants have erected across the said canal a draw-bridge, to enable the locomotives and cars of the said defendants to cross the said canal, which said drawbridge is at such a height above the waters of the canal as, when shut, to close the means of entrance to and exit from the same to all schooners and other masted vessels, and to prevent the same from entering the said canal from the said Burlington Bay, and to obstruct and impede the free navigation of the said canal. And the plaintiffs say that the defendants erected the said drawbridge without the sanction or permission of the Governor in Council, and without procuring any regulations to be made by him respecting the construction of the said drawbridge or the opening of the same, and no such regulations have ever been applied for by the defendants, or made by the said Governor in Council; and the plaintiffs say that by reason of the premises it became and was, and is the duty of the

said defendants to use and manage the said bridge across the plaintiffs' said canal in such a way as to cause the least possible impediment to the navigation of the plaintiffs' said canal, and to be ready and willing to open, and without any unreasonable delay to open the same at all reasonable times, on the approach of schooners and masted vessels desiring and intending to enter into or depart from the said canal, so as to permit the same freely to enter the said canal and depart from the same; yet the defendants, not regarding their duty in that behalf, have wrongfully and wilfully neglected, and still do wrongfully and wilfully neglect to open the said bridge at all reasonable times, and whenever the same is not required as aforesaid, on the approach of schooners and other masted vessels desiring and intending to enter into and depart from the said canal as aforesaid, and have not been and are not ready and willing to open, and do not and have not opened, and do not open the same without any unreasonable delay on the approach of such schooners and masted vessels as aforesaid, but, on the contrary, wholly refuse to open the same, or to permit any such schooner or masted vessel to enter into or depart from the said canal at any time between the hours of sunrise and sunset, although frequently requested so to do by the plaintiffs, and by the owners and masters of divers schooners and masted vessels which desired to enter the plaintiffs' said canal, and otherwise wrongfully and wilfully obstruct, hinder and delay such schooners and masted vessels as aforesaid.

Whereby, and by reason of the defendants' conduct in this behalf, schooners and other masted vessels paying, and which otherwise would have paid fees, tolls, and canal dues to the plaintiffs, have been greatly delayed and injured, and have been prevented from entering into and departing from the said canal, and many schooners and masted vessels which were accustomed to pass through and to use, and which would otherwise have continued to pass through and use the plaintiffs' said canal, and to pay fees, tolls, and canal dues to the plaintiffs, have wholly ceased to pass

through or use the said canal, whereby the plaintiffs have been put to great loss and charges, and have lost divers great gains and profits which they would otherwise have made, and have had their revenues from tolls and dues greatly diminished.

Second count. That the plaintiffs are a corporation, incorporated by Act of Parliament, and the owners of the canal in the County of Wentworth known as the Desjardins Canal; and the defendants are a corporation, incorporated by Act of Parliament, and the owners of a certain line of railway, in the first count mentioned, which said line of railway crosses the plaintiffs' said canal. And the plaintiffs say that the defendants wrongfully and unlawfully have obstructed and impeded, and still do obstruct and impede, the free navigation of the said canal, and wrongfully and wilfully prevent schooners and other masted vessels desirous of passing along the said canal, and of paying tolls to the plaintiffs, from entering into and departing from the said canal of the plaintiffs, to the great damage of the plaintiffs.

Demurrer, on the grounds, that the declaration does not charge the defendants with a breach of duty arising out of any duty imposed by law upon the facts stated in the declaration: that the plaintiffs do not shew any facts whereby a legal duty is cast on the defendants, either by common law or by Statute; plaintiffs allege an agreement, and then charge a duty on defendants, without stating whether or not it arises under such agreement: a duty is charged, but no facts are disclosed whereby the same can be supported. That the declaration is misconceived, in charging as a condition necessary to the construction and use of the said drawbridge over the said canal the sanction or permission of the Governor in Council: that there is no allegation that the refusal to open such drawbridge was not at such times as trains of the defendants are passing or about to pass over the same, and when it was necessary to obstruct the navigation of the said canal by the closing the said drawbridge, and crossing the same with trains.

And in addition, as to the second count, that no facts are shewn or alleged whereby the wrongful and unlawful matters charged are illegal and contrary to the rights of defendants under their Acts of incorporation: and that the said count does not sufficiently supply such allegations of matter of fact from which the existence of a legal liability can be inferred.

Irving, Q.C., for the demurrer.

Moss, contra, cited *Brown v. Mallett*, 5 C. B. 598; *Roberts v. Great Western Railway Company*, 4 C. B. N. S. 506; *Seymour v. Maddox*, 16 Q. B. 331; 1 Wms. Saund. 262 *a*, 262 *b*; *Thibault v. Gibson*, 12 M. & W. 95; *Bower v. Hill*, 1 Bing. N. C. 549; B. & L. Prec. 370; *Snure v. Great Western Railway Company*, 13 U. C. R. 376; *Wismer v. Great Western Railway Company*, *Ib.* 383; *Moison v. Great Western Railway Company*, 14 U. C. R. 102.

The Statutes cited are referred to in the judgments.

MORRISON, J.—By the 7 Geo. IV. ch. 18, the plaintiffs were incorporated to construct their canal from Burlington Bay to the Village of Cootes Paradise, through the intervening marsh and other lands, for the passage of sloops and other vessels of burden; and by the 28th section they were authorized to convert ordinary bridges across their canal, connecting public highways, into drawbridges, keeping them so that His Majesty's subjects and others, with their horses, &c., might pass thereon at all times, except when actually required to be open for the purpose of passing with vessels, &c., navigating the canal.

By the 4 Wm. IV. ch. 29, the defendants were originally incorporated under the style of the London and Gore Railroad Company, and they were authorized by the 9th section to intersect or cross any stream between the Town of London and Lake Ontario, provided they restored the stream or water course in a sufficient manner not to impair its usefulness. And by the 8 Vic. ch. 86, the name of the Company was changed to that of the Great Western

Railroad Company, with power to make and continue their railway from London to any point on the Niagara River. And by the 13 & 14 Vic. ch. 130, it was enacted that nothing in their charter, or in any Act of Parliament affecting the same, enacted or contained, should be construed to prevent the Company from crossing any navigable rivers or waters with their railway, upon duly providing against any unnecessary obstruction of the navigation thereof. And then came the 16 Vic. ch. 54 (passed 10th November, 1852), hereafter referred to, respecting the plaintiffs' canal, the closing up of the old entrance, and cutting the new one. Then the 16 Vic. ch. 99, sec. 4 (passed 22nd April, 1853), which authorized the defendants to cross any navigable stream, waters, &c., provided that the free and uninterrupted navigation thereof should not be interfered with.

We may assume from the various Acts of Parliament relating to the canal, that its original entrance from Burlington Bay was made by a cut or channel through the marshes referred to in the plaintiffs' charter, and that where the present entrance is situate no water-course existed, and that the defendants' railway passed over the land through which the canal was afterwards cut. The declaration avers that the defendants were obliged to carry their railway across it.

The 16 Vic. ch. 54, recites that at the time of its passage the defendants were improving the navigation of the plaintiffs' canal by means of a cut passing directly through the Burlington Heights, and connecting the waters of the canal with those of Burlington Bay, in consideration of the sum of £15,000, to be paid to the defendants by the plaintiffs; and the Town of Dundas was authorized to become security for the payment of that sum on the part of the plaintiffs; and by the fifth section of the Act, the plaintiffs or the defendants were authorized to permanently close and fill up the then entrance of the canal, where the defendants' railway then crossed the canal.

By the 16 Vic. ch. 169, sec. 6, it was enacted that where

railroads pass any drawbridge over any canal, which is subject to be opened for the purposes of navigation, the trains shall be stopped at least three minutes, &c.

And by the 24th section of the 18 Vic. ch. 176, after reciting that it was doubtful whether the sixth section of 16 Vic. ch. 169, applied to the defendants' railway, and that the drawbridges on their line were so situated that it was not considered necessary that the sixth section should apply to them, it then declares that that section was not intended to apply in so far as respects the bridge over the Desjardins Canal, nor to any swing bridge whilst the navigation was closed.

Upon the argument it was contended by the plaintiffs' counsel that the defendants had no authority to obstruct the navigation of or to cross any canal, or, if they had, that the erection of the bridge in question was not lawful, as the sanction of the Governor in Council had not been obtained, as provided for by the 137th and 138th sections of ch. 66, Consol. Stat. C., *The Railway Act*, which declared that it should not be lawful for any Company to construct any bridge over any canal until they had submitted the plan and the proposed site to the Governor in Council, and the same was by him approved, and subject to such regulations as to the opening of such bridge as the Governor in Council from time to time may make; and by the 139th section it is enacted that nothing in the sections 136, 137, and 138, shall be construed to limit or affect any power expressly given to any Railway Company by its special Act of incorporation, or any special Act amending the same. These three sections are consolidated from sec. 8 of 16 Vic. ch. 169.

As to the first objection, that the defendants were not authorized to cross the canal, I am of opinion that the Legislature has sanctioned and recognized the erection of the bridge in question. When we consider that Parliament authorized these defendants to close up permanently the former entrance of the canal, over which the defendants' railway passed, and recognizing the fact that the

defendants' railway did cross the plaintiffs' canal, and also recognizing an agreement between the plaintiffs and defendants, and which we may assume is the agreement mentioned in the declaration, under which the defendants were improving the navigation of the canal for their mutual benefit by making another entrance to the canal, and for which improvements the plaintiffs were paying a large amount to the defendants, and the 18 Vic., recognizing the existence of the drawbridge across the plaintiffs' canal, and declaring that the sixth section of the 16 Vic. ch. 169, should not be taken to apply to this bridge specifically by name,—from all these circumstances I think we may hold that Parliament tacitly sanctioned and recognized the erection of the defendants' draw-bridge across the plaintiffs' canal.

If we are at liberty to draw any inference from the various Acts of Parliament, it is obvious that by the making of the new entrance to the plaintiffs' canal, (which was only authorized by implication, no express authority being given to cut it,) the canal intersected the defendants' railway, and created the necessity of the drawbridge in question.

It was also contended that, conceding the power to erect the bridge, before the defendants could do so it was necessary that they should comply with the formalities and obtain the sanction of the Governor, as provided for by the 137th and 138th sections of the Railway Act (sec. 8. of 16 Vic. ch. 169). It does not appear by the pleadings, or in any of the Acts of Parliament, when the bridge in question was actually erected; the Act authorizing it passed the 10th November, 1852. If erected before the passing of the 16 Vic. ch. 169 (14th June, 1853), as a consequence, the provisions of the sections referred to would not apply; but, be that as it may, the 24th section of 18 Vic., above quoted, expressly declared that the 6th section of the very same Act (now the 170th section of the Railway Act) was not intended to apply to this bridge over the defendants' canal; and while the Legislature was thus exempting the defendants from the obligations contained in the 6th sec-

tion, it also, by the same Act, as I have already stated, recognized and sanctioned its existence and use, and that after the passing of the Act now invoked against it.

I therefore think that it is only reasonable for us to hold that the provisions of sections 136, 137, and 138, of the General Railway Act, do not apply to this bridge, and that its erection and use as a drawbridge has received such a legislative recognition that we must assume that it was lawfully erected.

The next question to be determined on this demurrer to the first count is, assuming that the defendants were authorized to erect and use the bridge as part of their railway, is there sufficient set out in the count to entitle the plaintiffs to recover. Upon this point much difficulty arises from the confused manner in which the count is framed, rendering it almost impossible to say what the pleader intended to charge. After setting out matter to shew that the erection of the bridge was an unlawful act, it goes on to say, by reason of the premises it became the duty of the defendants to manage the bridge in such a way as to cause the least possible impediment to the navigation of the canal, and to be ready and willing to open the same at all reasonable times, &c. This allegation of duty is quite useless, and cannot help the count, if the facts are insufficient to raise the duty. Then the breach of duty, or rather breaches, are, that the defendants wrongfully and wilfully neglected to open the bridge at all reasonable times, &c., and have not been and are not ready and willing to open, and do not open the same without any unreasonable delay, &c., but, on the contrary, refuse to open the same or permit any vessel to enter into or depart from the canal between the hours of sunrise and sunset, although frequently requested so to do by the plaintiffs and masters of vessels.

The count must shew the duty, and a breach of it. If any duty arises from the facts stated and the various Statutes which we are bound to notice, it is that the defendants should open the bridge at all times for the passage

of vessels using the plaintiffs' canal, when the bridge was not being actually used by the defendants for the passage of their trains; and as it is not shewn or alleged that at the time or times the defendants refused or neglected to open the bridge it was not being so used, the count is defective, as it is quite consistent with the fact that the alleged breach of duty to open the bridge was at a time when the bridge was being lawfully used by the defendants for the passage of their trains; and under such circumstances in my judgment no cause of action arose.

For these reasons I am of opinion that on the demurrer to the first count our judgment must be for the defendants.

With respect to the second count, I cannot see that it is open to any objection, and upon that demurrer our judgment must be for the plaintiffs.

HAGARTY, J.—The first count is framed on the assumption that the defendants must open the bridge for vessels navigating their canal at all reasonable times, and the breach is, in substance, a refusal so to open between sunrise and sunset. If the defendants must use the bridge only so as not to interrupt the navigation at all, or, in other words, if their user is subservient to the plaintiffs' right of free navigation, then the count seems good. But if this be reversed, and the defendants are only bound to swing the bridge when not actually required for passage of their trains, then I think the count fails, as there is no averment to meet such a state of facts.

I find great difficulty in satisfying myself as to the true position of the parties, the Statute law bearing on the subject is so confused and indirect.

The Canal Company were originally permitted to cut their canal, providing bridges for the highways across, for the public use.

Then, by agreement with the defendants, who had necessarily to cross the canal, the course was altered and a new cut made. At the new point of crossing defendants built

a drawbridge, as the count alleges, to enable their locomotives, &c., to cross the canal, too low, however, for schooners to pass under when closed. Although the allegation of duty does not help a pleading unless the duty flows from the facts, yet we may look at it to see the construction the plaintiffs put on the facts. They say it was the duty of the defendants "to use the bridge in such a way as to cause the least possible impediment to the navigation."

Now, granted the right of the defendants to use the bridge, as seems to be here fully conceded, how is that user to be restrained or governed? Both by the plaintiffs' own construction, and by the terms of the Acts of Parliament, the user is clearly sanctioned, and the section quoted by my brother Morrison, sec. 24, of 18 Vic. ch. 176, specially refers to this bridge, relieving the trains from the three minutes' halt thereat.

On the whole, I have arrived at the conclusion that the count is defective in not averring a neglect or refusal to swing the bridge when not required to be closed for the passage of the defendants' trains,—or, in other words, when not in lawful use.

The second count appears to me to be good, disclosing in very general terms a wrongful obstruction by defendants of the plaintiffs' canal. The manner of obstruction is not shewn, whether by a bridge or otherwise.

*Judgment for defendants on the first, and
for plaintiffs on the second count.*

REGINA V. THE DESJARDINS CANAL COMPANY.

Desjardins Canal Company—Obligation to repair bridge—Evidence—Placita and continuances—Practice.

The Desjardins Canal Company having been indicted for not keeping in repair the bridge over their canal where it crosses the highway, built for them by the Great Western Railway Company: *Held*, that they, and not the Railway Company, were bound to keep such bridge in repair.

Held, also, that evidence of the state of the bridge a few days before the trial was admissible, not as proof of that fact, but as confirming the other witnesses who swore to its state at the time laid in the indictment, and as shewing such state by inference.

Held, also, no objection that the proceedings on the record were in the Court of Queen's Bench *for the Province of Ontario*, there being no such Province when they were had, for the mention of the Province was surplusage; nor that there were no second *placita* or continuances on the record, for, if necessary, an amendment would be allowed.

Remarks as to objections taken in the rule, but not appearing on the Judge's notes.

THE defendants were indicted for not keeping in repair a bridge across the defendants' canal, the same being very dangerous and in great decay, &c.

The indictment recited the Act incorporating the defendants, which authorized them to make a canal from Burlington Bay to the Village of Cootes Paradise (now Dundas); also, the Act 16 Vic. ch. 54, the fifth section of which authorized the defendants or the Great Western Railway Company to permanently close up the then course or channel of the canal, &c., and to erect, keep, and maintain a safe and commodious bridge over and across the opening or cut through the said Burlington Heights for all Her Majesty's liege subjects, their horses, &c., to pass and re-pass; and that, in pursuance thereof, and under the power therein contained, the defendants did cut into and upon the Queen's highway, in, &c., in order to conduct their canal through the same, and in and by the same Statutes, as such corporation and the proprietors of the said navigation, became and were liable to erect a safe, &c., bridge over and across the said opening, and did erect the bridge, &c., over the said cut or canal, and in the Queen's highway.

Plea, not guilty.

The case was tried at the last Assizes at Hamilton, before John Wilson, J.

Upon the trial, the Crown produced witnesses to shew that the bridge in question was decayed, and in want of repairs, and dangerous. One witness, an engineer, stated, it was in an unsafe and bad state, and that no one could tell how soon it might fall. A witness, also an engineer, was called, and he stated that he examined the bridge the day before he gave his testimony, when the defendants' counsel interposed, and objected to evidence of the then state of the bridge in respect to the decay of the timber, as its then state had nothing to do with its state the year previous. The learned Judge ruled that if its state a year ago could be inferred from present appearances, he would allow the evidence. The witness then proceeded, and stated that the timber of the bridge was so decayed that it must have been decayed a year ago so as to be dangerous, and that, in his opinion, it was unsafe a year ago, and that he saw strong evidence of decay, and that the bridge required extensive repairs.

The agreements between the Great Western Company and the defendants, for the cutting of the canal and the building of a bridge, were put in; also, a bond of indemnity from the defendants to the Railway Company, indemnifying them for closing up the old course of the canal; also, a mortgage from the defendants to the Railway Company, for securing to the latter the money which they were to advance to the defendants for the purpose of cutting this new channel, which mortgage contained this recital: "And whereas the said Canal Company propose to make a cut through Burlington Heights for the passage of the canal, in the vicinity of the present natural channel, and to close up the latter."

It appeared also, from the evidence, that a suspension bridge had been first erected across the cut, which had been blown down, and that the present bridge was erected in the winter of 1857 by the Great Western Company, instead of the former, and the Railway Company's solicitor stated that

the defendants had refused to accept it: that there was no dispute about the bridge between the Companies until after it was blown down, when the defendants refused to have anything to do with it.

The learned Judge left the case to the jury to say whether the bridge was out of repair at the time charged in the indictment, and he told the jury, no matter who erected the bridge, the defendants were liable for its maintenance, and bound to maintain it, and that in his opinion the Great Western was also bound to do so.

The defendants' counsel objected that the case failed, because the indictment charged that the defendants erected the bridge, and the evidence shewed that they did not: that the Statute 16 Victoria imposed a disjunctive obligation, and that the Railway Company who built it was alone bound to maintain and repair it.

The jury found the defendants guilty.

During last Michaelmas Term, *M. C. Cameron, Q. C.*, obtained a rule *nisi*, calling on the Attorney General to shew cause why the verdict should not be set aside and a verdict entered for the defendant, on leave reserved, or for a new trial, the verdict being contrary to law and evidence, and for misdirection in the learned Judge telling the jury that the defendants were guilty whether the Railway Company was bound to repair the bridge or not, and although the Great Western Company built the bridge, and that the jury might consider the present state of the bridge in determining whether the same was out of repair at the time laid in the indictment, though the indictment was found a year before the trial, and for receiving evidence of the condition of the bridge a few days before the trial; or why judgment should not be arrested, on the ground that the proceedings set out in the record were had in the Court of Queen's Bench for the Province of Ontario, there being at the time when said proceedings were had no such Court or Province, and there being no proper *placita* day or continuance on the record; or why the verdict should

not be set aside, there being no *placita* to the pleas, and no continuance or respite of jurors entered on the record.

During the same term, *M. O'Reilly*, Q. C., shewed cause, citing *Regina v. Inhabitants of Ely*, 19 L. J. M. C. 223; *Add. T.* 342; *Rex v. Kerrison*, 3 M. & S. 527; *Chitty Crim. L. Vol. IV.* p. 396.

M. C. Cameron, Q. C., supported the rule, and cited *Doe Burnham v. Simmonds*, 7 U. C. R. 598; *Sellon's Practice*, Vol. I. p. 422.

MORRISON, J., delivered the judgment of the Court.

By the 28th section of the 7 Geo. IV. ch. 18, the Act incorporating the defendants, it is enacted that whenever it shall be necessary to cut into or upon any highway, in order to conduct the said canal by or through the same, the Company shall, within one month after cutting through or into such highway, cause to be constructed a secure, sufficient, and commodious bridge, for the passing of carriages, or otherwise sufficiently repair the damage, so as to re-establish the communication between the several parts of the said highway, under a penalty, &c.

And by the 16 Vic. ch. 54, sec. 5, it was enacted "that it shall and may be lawful for the said Company, or the Great Western Railroad Company, to permanently close, shut, and fill up the channel or course of the (then) canal at its eastern extremity, and the place where the Great Western Railroad crosses or intersects the said channel or course of the said canal, and to erect, keep and maintain a safe and commodious bridge over and across the opening or cut through the said Burlington Heights for all Her Majesty's liege subjects, their horses and carriages, free of toll at all times thereupon, and thereby to pass and re-pass," &c.

This Act recited that extensive operations were then being carried on by the Great Western Railroad Company for improving the navigation of the canal by means of a cut passing directly through the Burlington Heights, &c., at or for the sum of £15,000, to be paid to the Great Western Company by the defendants, &c.

From these Statutes we think it is clear that it was the duty of the defendants, when it was necessary for the purposes of their canal to cut through a highway, to construct a secure and commodious bridge for the passage of carriages; and that the latter Act, which impliedly authorizes the cut in question to be made, casts a duty on the defendants to erect and keep and maintain a safe and commodious bridge across the cut through the heights.

It was argued by the defendants' counsel that the bridge was built by the Great Western Railroad Company, and not by the defendants, and it was therefore the duty of the Railway Company, and not the defendants, to maintain the bridge. The fact may be that the Great Western Railroad Company erected the bridge, but we must look at the circumstances under which it was built, for whom, at whose instance, and for what purpose. The object of the cut which caused the necessity of erecting a bridge, was to give to the defendants a new entrance to their canal; and it appears quite clear from the agreements and documents put in at the trial, that the Great Western Company were mere contractors in making the cut and erecting the bridge for the defendants, for which works the defendants agreed to pay to the Railway Company £15,000, the Great Western Company performing the works at less expense in consideration of the defendants permitting them to permanently close up the old entrance to the canal, and over which the railway passed. The necessity for the bridge originated with the making the cut through the Heights, and the cut was made and is kept open for the use and benefit of the defendants, and as forming part of their canal. As said by LeBlanc, J., in *The King v. Inhabitants of Lindsey* (14 East, 317): "The authority given to the Company to make the cut, which rendered the highway impassable without a bridge, must create an obligation in them to erect the bridge, though the word *authorized* in the Act might not of itself create the obligation;" and Grose, J., in the same case, says: "The defendants" (the inhabitants) "cannot be liable

to repair a bridge erected and continued for the private benefit of the Company ; for without the cut made by the Company for their own benefit, there would be no necessity for the bridge."

And what is said by Patteson, J., in giving judgment in *Regina v. Isle of Ely* (15 Q. B. 827), has a strong bearing on this case. There the Company made an artificial cut for draining the Bedford Level across a highway, and the inhabitants were indicted for not keeping a bridge over it in repair ; and that learned Judge said, in laying down a general rule, p. 844 : " That principle seems to be this, undoubtedly a just one, that, where the act making the bridge necessary, though authorized to be done, interferes with the public right, is done primarily for private purposes, and the public use, from which the public benefit is inferred, is to be referred only to the act, because made necessary by it, the public indeed remaining only with the same convenience which it had before, the authority to do the act is conditional only, equally whether the condition be expressed or implied ; and the condition also is in both cases continuing so long as the act continues whereby the public right is interfered with. * * * *

It appears to us that, when the Adventurers first cut the drain, and interrupted the public highway, that act, however authorized by Commissions of Sewers or other power vested in them, was done for their own use, benefit, and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge as convenient for the public as the old one : that the public were in truth no gainers by the change : they were by this hypothesis merely placed in the same situation as before ; and that the condition which was necessary to legalize the first cutting of the drain was and is a continuing one ; the instant it is broken the indefeasible rights of the public revive, and the cut becomes a nuisance."

On the whole, we are of opinion that the defendants were bound to maintain and keep the bridge in repair, and that the learned Judge properly directed the jury in that respect.

As to the ground of misdirection in telling the jury that they might consider the then present state of the bridge in determining whether the same was out of repair at the time charged in the indictment, we find no such direction noted by the learned Judge, nor any objection that such a charge was given. It frequently happens, no doubt through inadvertence, that grounds are inserted in rules that the Judge's notes do not support. In the present case, neither the objection now mentioned, nor that leave was reserved to enter a verdict for defendants, which is asked for in this rule, appears.

We may here remark that the Court cannot notice such grounds unless they appear in the notes, and it is the duty of counsel on moving to ascertain whether the objections they rely on were noted by the Judge who presided at the trial. If they do not appear to be noted, a reference should be made to the Judge to have the notes amended before they are made the grounds of a motion.

In this case the rule is, however, also moved on the ground of the reception of improper evidence, which is noted, and in some respects embraces the point raised as one of misdirection. A reference to the notes of the trial shew that the testimony objected to, although it involved evidence of the state of the bridge a few days before the trial, yet the object of calling the witness was to shew from its then state of decay that it must have been dangerous and out of repair at the time laid in the indictment; the witness being an engineer, and, we may assume, skilled from experience and observation in such matters, and who from an examination of the timber and structure of the bridge, and from what he then saw, was able to form an opinion of the state of the timbers of the bridge at the time charged in the indictment. We cannot say that such evidence was not receivable for the purpose of supporting the accuracy of the testimony of the other witnesses who testified to its previous state. The evidence was not given for the purpose of shewing the then state of the bridge as

a charge against the defendants, but, from its then state, the truth of the fact in dispute or point to be tried.

As to the ground taken in the rule for arresting the judgment, on account of the *placita*, the style of the Court being stated of the Court of Queen's Bench of the *Province of Ontario*, at Toronto, and there being no proper continuances on the record, no authority was cited for arresting the judgment on either ground. The words "of the Province of Ontario" we may consider as surplusage and unnecessary, and we can take judicial notice that there is only the one Court of Queen's Bench at Toronto. As to continuances, *Tidd's Practice* says that they may be entered at any time, and that leave has been granted to enter them after verdict—Vol. II. p. 732-3, 8th ed.

And so with regard to the objection, as ground for a new trial, that there was no second *placita* to the plea, or proper continuances on the record. I have examined the forms given in *Corner's* and *Gude's* books on the practice, and I find in the forms there given, as well as the directions to make up the record in such cases, that only one *placita* is mentioned and required, and that at the beginning of the *Nisi Prius* record, as of the term in which issue was joined. But, at all events, no objection was taken at the trial as to the sufficiency of the record, and we would not, after verdict, give effect to any such objection; but, on the other hand, in a case of this nature, we should give leave to amend if necessary.

We are therefore of opinion on the whole case, that the rule *nisi* should be discharged, and, if the Crown desires it, we give leave to amend the record.

Rule discharged.

NICHOLLS V. THE GREAT WESTERN RAILWAY COMPANY.

Railway accident—Contributory negligence—Obligation to fence.

The plaintiff being in a cab, approached a railway crossing, where a train could be seen at a distance of three-quarters of a mile. The driver, however, who knew the crossing well, did not look out at all until within about twenty yards of the track, and then only straight in front of him. He did not see the train, which was a very long one, consisting of twenty passenger cars and two engines, until the horses' feet were on the rails, and it was within seventy feet, and he then tried to cross in front of it, but the cab was struck and overturned. The plaintiff, from within, had seen the train approaching, and called to the driver to stop, but a man sitting on the box with him urged him to go on, which he did.

Held, that the driver's negligence was so far the cause of the accident that the plaintiff could not recover, notwithstanding the defendants' neglect of their statutory obligation to have a fence and gate at the crossing, with an attendant to watch it. A nonsuit was therefore ordered.

Such obligation was assumed in deference to decided cases. *Quære*, however, whether the Statute imposes it.

THIS was an action in which the plaintiff sought to recover damages, for injuries received by him through the negligence of the defendants.

The first count of the declaration stated, that the defendants were authorized to construct a line of railway across a certain public highway, and that it was their duty to restore and keep the highway in its former state of usefulness, and maintain sufficient fences upon the line of the route of their railway, and to keep and maintain a watch at the point of intersection, or other sufficient means, &c., for the safety of persons travelling over that part of the railway: that the defendants disregarded their duty, and did not restore the highway, &c., nor erect or maintain fences, or keep sufficient guards or watchmen, or other means of precaution for the safety of persons travelling over the highway, or observe care in managing their locomotives, or employ careful servants, &c., but, on the contrary, employed careless and incompetent servants, so that, by and through the carelessness and negligence of the defendants, and want of due and proper care, &c., the locomotives of the defendants were driven against a carriage wherein the plaintiff then was, whereby he was injured, &c.

The second count was to the like effect, and alleging that for want of careful servants, and want of sufficient notice to the plaintiff of the approach of the locomotives, and of sufficient watchmen to give such notice, or other proper and sufficient precautions against injury to persons travelling, &c., and want of care in defendants' servants, the locomotives of the defendants were driven against the carriage in which the plaintiff was, and he was thrown out and greatly injured, &c.

Plea, not guilty, by Statute 16 Vic. ch. 99, sec. 10.

The case was tried, before Richards, C. J., at the Fall Assizes of 1866, at Hamilton.

From a plan produced at the trial, and from the evidence, it appeared that the defendants' railway, at the crossing or point in question, runs east and west, the locomotive on the occasion when the accident occurred going west. The railway crosses at right angles a highway leading from the north, and on which road the plaintiff was, in a cab, travelling south to Hamilton. This portion of the highway only leads from the railway to the north about 300 yards, then turning at right angles to the east, and then running nearly parallel to the defendants' railway, the land between the road after it turns to the east and the railway being enclosed, and that part bounded by the road approaching and intersecting the railway, at the time of the accident, being a meadow extending 150 yards east, and next to it a field of Indian corn. The railway was fenced on both sides, except at the crossing, where there was only the usual cattle guards, but no gate or fence, or person to warn travellers of the approach of trains; the railway being in the centre of the width of land enclosed by the railway fences. At the crossing in question, on the north side of the defendants' enclosure and east limit of the highway, at a distance of 76 feet from the rails, there stood a shed, 18 feet by 11, and 9 feet 3 inches high, but only 7 feet 6 inches above the centre of the road, and opposite to it, on the west side of the highway, a small house. At the angle of the road, where it turns from the

east and leads to the crossing, stands the house of one Lotteridge, referred to in the evidence. The wind at the time was blowing from the west and south.

Upon the trial the following testimony was given for the plaintiff:

Arthur Cline, the cabman who drove the cab, testified, that, as he was driving down near Lotteridge's Hill, "that he drove kind of slow," there being a hollow as he approached the railway, and a rise of three or four feet: that he first saw the train when his horses' feet were on the track, coming apparently very fast: that he did not hear or see anything of the approach of the train, and he said that three or four barns, "built kind of cross-ways," obstructed his view; that he first heard a voice inside of the cab say "Stop!" and that a Mr. Law, who was on the box with the witness, said "Put the whip on!" that he did so and the horses sprung as fast as they could, and the train struck the cab behind the axle of the left hand wheel, sending the cab over the fence, and smashing it, and the witness was thrown on the highway, east side, fifteen yards from the track: that while going down Lotteridge's Hill he saw no train: that he allowed his horses to go slow up the rise, touching them with the whip as they approached the track, into a jog trot, and that he looked both ways (east and west) when twenty yards from a shanty near the railway: that the train whistled, to the best of his knowledge, just when it was striking the cab, and he said that, if he had passed on another foot or foot and a-half, they would have escaped. On cross-examination, he stated he was employed by the plaintiff: that he had crossed the track at this crossing on different occasions, having driven cabs for six years in Hamilton; that he looked out a minute or more before he got to the track, and the first he saw of the train was when the plaintiff called "stop" from the inside of the cab; that about twenty yards before he came to the shanty he looked east and west, and saw no train (that he could see about three-quarters of a mile east), that from that time he did not

look for a train until he got to the track. He also stated, that he afterwards placed his cab behind the stable near the railway track, and in the centre of the road, and looked over the top at an engine, saw it 350 yards off, could just see about six or seven inches of the top of the smoke-stack; that it was impossible to see the railway track. The shanty referred to was about 28 or 29 feet from the track.

Robert M. Law. This witness was sitting on the driving box with the last witness, on his left (east) side; he first saw the train about a second before it struck the cab, his back was to it; saw the driver look towards the train, and his countenance change; he turned, saw the train, and cried to the cabman to put on the whip, which he did, thinking it was the only chance for safety; about the same time he heard a voice, from inside the cab, cry "Stop! stop!" He said that he heard no whistle, or indication of the train coming; that the wind was blowing from witness to the train, that it had been blowing strong all day, and that there was a breeze then; that at the moment he saw the train it was impossible to stop either train or the cab; that he saw no watchman, nor was he aware there was one there. On cross-examination, he stated that at the time of the accident the driver was looking straight forward, and he and the driver had been conversing the way along; that he (witness) had thought of the railway, and that he had command of the view of the road to the west, but did not look to the east. When he saw the driver's countenance change, they were 70 or 80 feet from the engine, and that was the first time he saw it. He also stated, that if he (witness) had been looking to the east, the track being straight and the road level, he ought to have seen the train as far as visible, and in time to have prevented a collision; that the corn in the cornfield would not have obstructed his view; that he thought the cabman exercised ordinary care; that he (the cabman) only looked out for the train at a distance of 70 or 80 feet from the crossing, and then only in front; if he had been looking

to the east, he possibly might have seen it. He also stated the accident might have been avoided if one had been looking both ways, and a whistle had been blown. Saw no carelessness on the part of the driver.

William Grandy stated he was standing at Lotteridge's house, about 300 yards from the crossing; that he saw the train approaching, and saw the cab and another vehicle going towards the crossing, and saw indistinctly the collision, and heard the crash; that the plaintiff stated to him that he saw the train on the track, and called to the driver to stop, but did not say the distance from the crossing; but he understood him that when he first spoke the horses were trotting, and as they approached the crossing they slackened, and he thought they were about to stop, but, not doing so he spoke again, and then heard Law tell the driver to go on, and it was too late to stop; and, as witness understood, the plaintiff seemed to think that if they had stopped at first the accident would not have happened. This witness did not think there would be any difficulty in seeing an approaching train from Lotteridge's to the crossing, for three-quarters of a mile there would be an uninterrupted view; that the corn was no obstruction to the view in driving from Lotteridge's to the crossing, and if a person driving along had been looking that way (*i.e.* to the east), he must have seen the train and avoided collision, if paying attention. This witness had no particular recollection of hearing the train in question.

Thomas Anderson, lived about 230 yards from the crossing; was sitting in his house at tea, and heard the crash on the railway; heard the whistle blown two or three times severely, and he ran out. There is a small shanty near the railway, and further east, half-a-mile off, Mr. Wm. Lotteridge's barns, about 30 or 40 yards from the track; they would obstruct the view along there. Half-way between Lotteridge's house and the track the cornfield might make a slight obstruction—very slight.

Robert Anderson, remembered the accident. He heard the crash before he heard the whistle; no whistle before the crash.

Another witness, swore that he was about 300 yards behind the cab at the time of the accident. About half-a-mile from the cab he heard the train, before he turned the corner, by the noise it made, but did not hear the whistle; saw the cars perfectly well, and if he had paid any attention to it would have heard them sooner than he did. He next saw the cars about 200 yards from the crossing, and from thence to the crossing there was nothing to prevent one seeing the train; Lotteridge's barn did not obstruct the view; and he stated, that if a person had been looking out, paying any attention to his own safety, there would be no danger of being run over by that train. On cross-examination, he said that the next day he went all the way from the corner to Lotteridge's, and saw the train all the way from the woods to the crossing; stood within 50 yards from the shanty, and could see the locomotive coming 500 yards off.

Charles De Pew was at the back of a Mr. Gage's house, two or three hundred yards east of the highway; saw the train coming quite fast; did not hear any whistle, but is a little deaf; they whistled after passing the wood; the wind was blowing pretty hard from the south-west. Saw the cab struck; thinks in coming from Lotteridge's could see the train easily, until you came to the shed.

Mary Farmer, saw the train coming out of the woods when near the barn, before turning from Lotteridge's; passed the corner before the accident; heard the whistle and the crash, half-way between Lotteridge's and the railway; was driving behind the cab. Witness's husband directed her attention to the cars; heard them distinctly at times; at other times the wind carried the noise away.

Robert Yates.—This witness's testimony went to shew that the shed near the crossing obstructed the view, so as to make it dangerous to some extent, *i.e.* the train would be hid from the view while a person was travelling 18 to 20 feet, the shed being 18 feet long and 9 feet high. The witness stated, that in going from Lotteridge's corner he didn't think he, or any man who travelled so carefully as he did, would be run down.

Three other witnesses were called, who testified they did not hear any whistle until after the accident; and several witnesses to shew the extent of the injuries suffered by the plaintiff.

At the close of the plaintiff's case, the defendants' counsel moved for a nonsuit, contending that the plaintiff was in the same position as the cabdriver, and that if the neglect of the cabdriver contributed to the injury, the plaintiff could not recover. The learned Chief Justice said he should leave it as a question of fact to the jury, to say if the plaintiff's driver was guilty of negligence, and substantially contributed to the accident by such negligence; and, if the jury should find in favor of defendants on this point, he reserved leave to move to enter a nonsuit, if the Court should think that, in relation to the duties imposed on defendants by the Statute, such finding is a defence to this action.

The defendants called witnesses.

The first was the defendants' Solicitor, who proved that in the trial of another suit arising out of the accident, the plaintiff, being a witness, swore that there was no doubt that if the cabdriver had looked out the accident would not have happened, unless he wilfully drove against it.

Several witnesses were called, to shew that there were no obstructions to prevent those in the cab from seeing the train approaching.

William Lotteridge, was working about 800 yards from the track at the time of the accident; saw the train coming, and heard it whistle some time before it got to the crossing, thinks about three or four hundred yards, a long continuous whistle, and afterwards heard two short whistles, on which he thought there was something on the track, and the horses were then seen running away. He said, if the parties in the cab had paid attention they would have heard the whistle, and also, that there was no difficulty in seeing the locomotive above the corn from the road, and at one place he could see the cars quite over the corn. On cross-examination, he said the first whistle did not continue until the train got to the crossing, the next whistle

was at the crossing ; the wind was blowing pretty strong towards witness. The plaintiff was laid up in witness's house on account of the injury, and he told witness he saw the train, and if they had stopped when he told them there would have been none of this.

Thomas Lotteridge, father of the last witness, was sitting in his house ; his sight is defective, but he saw the train approaching, heard the whistle blow, and told a Mr. Grandy there must be something on the track, as they did not blow there unless something was wrong. Grandy went to the window, and said he saw the train, and then said, "Something has happened, for I hear the crash ;" it was about a minute between hearing the first whistle and the crash.

George De Pew, was working with Mr. Lotteridge ; heard the whistle. She began to blow before she came to the culvert, and continued blowing until she passed the culvert, a long whistle when near the crossing, east of it she gave two whistles ; heard it quite plain ; did not blow until it came to the crossing ; the last two whistles not nearer than 150 yards from the crossing.

William De Pew, was with the last witness, and corroborated his testimony ; and two other witnesses testified they heard the whistle before the train came to the crossing.

Henry Smith, first saw the train from Lotteridge's corner, and heard it whistle long and loud about 500 yards from the crossing, and also saw the cab and another vehicle in front of witness. He stated that if any of the parties in the cab had looked down the road, it was impossible not to see the train anywhere on the road, from Lotteridge's corner to the crossing ; did not think the cab had reached the shed when witness heard the whistle ; the cab was about 50 yards ahead of witness. He swore the train was over 200 yards off when he heard the whistle, another whistle 50 or 100 yards from the crossing. He first saw the cars east of the cornfield, and they were in his sight all the time to the accident.

Four other witnesses heard the whistle blow before the train reached the crossing ; and another witness, a pas-

senger in the train, heard the whistle about 400 yards from the crossing.

The engine-driver was called, and he stated, he gave a long whistle when over 300 and under 500 yards from the crossing, such as is given at crossings, and for the purpose of warning approaching vehicles; that he was keeping a sharp look-out, as the train was not a regular one, and the track was being repaired; that he turned to look at the fence, and just as he turned to look in front he saw the cab flying, and whistled down brakes, sharp and short; that he had two engines and twenty cars, and that he could not have stopped the train and prevented the accident if he had seen them within 40 yards; if he had put on the brakes 300 yards before coming to the crossing he could not have stopped the train, and the speed would have been lessened very little, and if he had seen a cab approach the crossing would never have thought of stopping the train; that when he emerged from the woods he whistled for the brick church crossing, and next for Lotteridge's, the one in question; he was looking ahead at the time, his attention being confined to the track, and he blew for the purpose of warning vehicles; when he stopped whistling he might have been 250 yards from the crossing, and from there could not have diminished the distance 20 feet with down brakes.

The learned Chief Justice left the case to the jury, subject to the point raised as to the accident being contributed to by the plaintiff's driver; and he asked the jury to say if the defendants were guilty of negligence, or neglected to take care in working their road, telling them, in deciding that question, to consider if the accident was caused by the omission of the defendants to fence along the line of their railway, and if the accident was really caused by that omission, as to that issue to find for the plaintiff; and that incidentally they would consider whether the accident was caused by the omission of the driver to look out for the cars, and also the omission to whistle on the part of the defendants.

Defendants' counsel objected to the learned Chief Justice

telling the jury that defendants were bound to fence along the line of the railway.

The jury returned a sealed verdict, as follows: 1st. That had there been a gate at the crossing, as required by the charter, the accident would not have occurred. 2nd. That the plaintiff is entitled to damages, \$800. 3rd. That, although the cabdriver contributed by his neglect to the accident, he did not do so substantially, sufficient warning of the approaching train not having been given to him, by a continuous whistle up to the crossing.

In Michaelmas Term 1866, *Irving*, Q.C., obtained a rule, calling on the plaintiff to shew cause why the verdict rendered should not be set aside and a nonsuit entered, pursuant to leave reserved at the trial, and on the ground of the finding by the jury. The case was argued during this term, with the case next following, *Rastrick v. The Great Western Railway Company*.

Miles O'Reilly, Q.C., in this case, and *R. Martin* for *Rastrick*, shewed cause during Easter term last. They contended that the privilege of crossing the highway being conditional, and the condition not having been observed, the defendants were there without authority: *Regina v. Scott*, 3 Q. B. 543; *Regina v. North of England Railway Company*, 9 Q. B. 315; *Regina v. Grand Trunk Railway Company*, 17 U. C. R. 165:—That as defendants were bound to fence, and neglected it, they could not set up the plaintiff's contributory negligence as an answer, especially as but for the want of fences such negligence would have amounted to nothing: *Renaud v. Great Western Railway Company*, 12 U. C. R. 408; *McDowell v. Great Western Railway Company*, 6 C. P. 180; *Ricketts v. East and West India Docks, &c., Railway Company*, 12 C. B. 160; *Fawcett v. York and North Midland Railway Company*, 16 Q. B. 610; *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244; *Tyson v. Grand Trunk Railway Company*, 20 U. C. R. 256; *Raisin v. Mitchell*, 9 C. & P. 613; *Waite v. North Eastern Railway Company*, E. B. & E. 719; *Manley v. St. Helen's Canal and Railway*

Company, 2 H. & N. 840; *Davies v. Mann*, 10 M. & W. 546; *Bilbee v. London, Brighton, &c., Railway Company*, 18 C. B. N. S. 584; *Scott v. Dublin and Wicklow R. W. Co.*, 11 Ir. C. L. Rep. 377; *Clayards v. Dethick*, 12 Q. B. 446; *Wyatt v. Great Western R. W. Co.*, 34 L. J. Q. B. 211; *Lunt v. London and North Western Railway Company*, L. R. 1 Q. B. 277; *Stapley v. London, &c., Railway Company*, L. R. 1 Ex. 21; *Stubley v. London and North Western Railway Company*, L. R. 1 Ex. 13; *Caswell v. Worth*, 5 E. & B. 849; *Cowley v. Mayor, &c., of Sunderland*, 6 H. & N. 565.

Irving, Q.C., and *Freeman*, Q.C., supported the rules, citing *Dowell v. General Steam Navigation Company*, 5 E. & B. 195, 203; *Sills v. Brown*, 9 C. & P. 601; *Caswell v. Worth*, 5 E. & B. 849; *Senior v. Ward*, 1 E. & E. 385; *Greenland v. Chaplin*, 5 Ex. 243; *Butterfield v. Forrester*, 11 East 60; *Dascomb v. Buffalo and State Line Railway Company*, 27 Barb. 221; *Mangan v. Atterton*, L. R. 1 Ex. 239; *Indermaur v. Dames*, L. R. 2 C. P. 311.

MORRISON, J.—As we concur generally in the grounds upon which the Court of Common Pleas rested their decision in the case of *Winckler v. Great Western R. W. Co.*, in which judgment was delivered last term (18 C. P. 250), the cause of action there arising out of the same accident, and supported by almost the same testimony, the defendants are entitled to our judgment.

We are of opinion, after a careful consideration of the evidence, that the learned Chief Justice should have directed a nonsuit. It is quite clear that, if the plaintiff's driver had taken any care whatever as he approached the defendants' railway, he necessarily would have seen the long train, composed of two locomotives and twenty passenger cars, and prevented the accident. On the contrary, from his own testimony, as well as the witness, Law's, who sat with him on the box, he did not look out for the train until within twenty yards of a shanty near the railway, when he says he saw no train, although he could see in the direction the train was coming three-quarters

of a mile; and from that period until he reached the rail, during which time caution ought to have been used, he stated he only looked straight forward, looking neither to the right nor the left, until his horses' feet were on the rails, when he saw the train, for the first time, within seventy feet of him, and, at the bidding of Law, whipped his horses across the track, and whilst so crossing the accident happened. Law stated that the cabman only looked out for the train when about seventy or eighty feet from the crossing, and then only in front, and that if he had been looking to the east he might possibly have seen it (in fact, he necessarily would have seen it), and the accident might have been avoided.

The plaintiff himself, from the inside of the cab, saw the train approaching, and as the cab neared the crossing he noticed the speed of the horses being slackened, and he thought they were going to stop, but not doing so he called to the driver to stop, and heard Law tell the driver to go on. The whole of the evidence, taken together, presents as strong a case of negligence on the part of the plaintiff's driver as it is possible to imagine, and in my opinion it would be holding out an inducement to incautiousness, if we were to decide, upon the facts of this case, that there was no contributory negligence on the part of the plaintiff's driver. I cannot assent to the argument of Mr. O'Reilly, that the driver was not bound to keep his eyes open. There is a duty incumbent on all persons driving or walking on a road crossed by a railway, and it is dictated by common sense and prudence, that on approaching a railway crossing they should do so with care and caution, both with a view to their own safety, as well as the safety of passengers travelling by the rail. A railway track, *per se*, as said by Pollock, C. B., in *Stubley v. The London and North-Western Railway Company*, L. R. 1 Ex. 16), "is a warning of danger to those about to go upon it, and cautions them to see whether a train is coming."

I do not think it necessary, for the decision of the present case, to consider the effect of the defendants' duty to

have fences across the public highway, or gates erected thereon, as, in my judgment, if the plaintiff's negligence, as said by Lord Campbell in *Dowell v. Steam Navigation Company* (5 E. & B. 206), "in any degree contributed to the accident, he is not entitled to recover;" and as I am of opinion the cab-driver did so contribute, or, rather, was the cause of the accident, the omission on the part of the defendants to comply with some statutable requirement did not thereby exonerate the plaintiff, or his servant, from using proper and ordinary caution. If I were now called upon to decide whether the defendants were bound to erect fences or gates, I am not prepared to say that the legislature, by the 9th section of 4 Wm. IV., ch. 29, which enacts that these defendants should erect and maintain sufficient fences upon the line of the route of their railway, intended that the company should fence or place gates across the public highways, nor do I think that such is the proper construction to be put on the language used in the section. However, the case of *Renaud v. Great Western Railway Company* (12 U. C. R. 408), in this Court, followed by the other cases of *Parnell v. Great Western R. W. Co.* (4 C. P. 517) and *McDowell v. Great Western R. W. Co.* (6 C. P. 180) in the other Court, have so settled the point that the question is not open here for discussion.

The rule will be absolute to enter a non-suit.

I may add that the learned Chief Justice, who heard the argument, concurs in the result, both in this case and that of *Rastrick* against these defendants.

HAGARTY, J.—I concur in the result arrived at by my brother Morrison.

I tried the action in the Common Pleas of Cline against these defendants, where the driver of the cab sought to recover, and this plaintiff and the other passengers were examined as witnesses. I directed a non-suit, being fully convinced that the evidence shewed one of the clearest cases of substantial contributing to the accident by the

plaintiff that was ever before a Court. The majority of the Court of Common Pleas agree in this view.

I assume, on the authority of decided cases, that defendants were bound to fence, but if the question should arise in the Court of Appeal I would desire to hear further argument before assenting to the doctrine.

In England, manufacturers are in certain cases required to fence machinery in motion. If a workman, knowing that there is machinery in motion unfenced, chooses to walk directly against it, with his head turned away, and not looking before him or directing his steps, although it may be true to say that had the fence been there he would not have been hurt, yet I think it not correct to say that that alone entitles a plaintiff to recover, however heedless he may have been of his own safety, or deficient in reasonable care.

But even assuming the obligation to fence, I can see nothing moving towards the unfortunate accident which has caused so much litigation, except an utter disregard on behalf of the cab driver of that common prudence and care which should govern every person about to cross a well-known railway crossing, known to be unfenced and to be constantly traversed by trains. If parties so acting can recover, it must be solely on the ground that the defendants are a Railway Company; and to hold them entitled to damages, notwithstanding this total disregard of their own safety, is to encourage carelessness and endanger human life, not only on the part of those crossing the track, but also on the part of the passengers in the trains.

Rule absolute for nonsuit.

RASTRICK V. THE GREAT WESTERN RAILWAY COMPANY.

Railway accident—Contributory negligence—Obligation to fence.

In this case also, upon substantially the same evidence as the last, it was held that the plaintiff could not recover.

The jury were directed, that if they were satisfied the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff. *Held*, a misdirection, for that if the driver by his negligence contributed to the accident, so that but for his want of reasonable care it would not have happened, the plaintiff could not succeed.

THIS case was one similar to that of *Nicholls v. The Great Western Railway Company*, (ante p. 372,) being brought by another of the persons who were in the cab at the time of the accident.

The evidence taken, or rather read, at the trial, with respect to the cause of the accident, was the same as that given on the trial of the case of *Nicholls*, the testimony of the witnesses for the plaintiffs and the defendants taken in that case being read to the jury, from the learned Chief Justice's notes, with the exception of *Nicholls*' testimony, who was called as a witness in another case, *Winckler v. The Great Western Railway Company*, and his evidence also read to the jury.

Nicholls' testimony shewed that he was inside the cab, and was the first to see the train, about 150 yards from the cab, the latter being at the time close to the rails, about 30 feet distant from where he (*Nicholls*) sat; that he called out, "For God's sake, don't pass!" and he heard Law, who was sitting with the cabman on the box, answer, "Lay on the whip!" and the whip being laid on the horses, they sprung forward, and got nearly over, when the engine struck the cab; that the only reason why he was looking in the direction of the coming train, was his looking at a child in the cab; that he never thought of the railway at all; if he had looked out, the train would have been visible for 500 yards in that direction. The track is elevated above the land, on both sides; and he stated, that if the driver had looked down the road

he could see a long way ; and he also stated, there was no doubt they would have been saved if the cabman had been vigilantly looking out for the train, as he would not have wilfully run into danger.

This case was also tried before the learned Chief Justice of the Common Pleas, at Hamilton, last Spring, who, in his charge to the jury, left it to them to say if the plaintiff's driver, by his own culpable negligence, substantially contributed to the accident ; and directed that, in considering the question of negligence, the jury might look to the fact that it was a crossing not protected by gates or fences, and that trains were frequently passing at high speed : that the defendants were bound to fence along the line of the road, and that, if the jury were satisfied the accident would not have occurred if the defendants had erected and maintained sufficient fences upon the line of the route of the railway, they should find for the plaintiff.

The charge was 'objected to by the defendants' counsel, and the jury gave a verdict of \$400 for the plaintiff ; and they found that the defendants did not fence the line of the road according to law, and that if they had done so, nothing which the plaintiff's driver did or omitted to do would have caused the accident.

In Michaelmas Term last, *Irving, Q.C.*, obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted, the verdict being against law and evidence, and on the ground of misdirection in the following points :—that no proposition for the consideration of the jury was submitted, by which they were asked to exclude the non-existence of fences being negligence connected with the accident, whereas the jury should have been asked whether the accident was not the result of the plaintiff's negligence, irrespective of any negligence by defendants in not fencing ; and that the jury should have been told it was not material what was the negligence of the defendants (so that it was not the proximate cause of the accident), if the jury thought there was

negligence on the part of the plaintiff's driver, and that such negligence concurred to produce the accident, and the defendants' driver could not have avoided the accident on his part.

During last term *R. Martin* shewed cause, and *Irving, Q.C.*, supported his rule.

The case was argued with that of *Nicholls v. The Great Western Railway Company*, see p. 372.

MORRISON, J., delivered the judgment of the Court.

This case is also governed by the decision in the case of *Nicholls* against these defendants; and we are of opinion that there should be a new trial, as we think there was abundant evidence to shew that the plaintiff's driver by his negligence contributed to the accident, and that it was caused by his not using reasonable care and caution when about to cross the defendants' railway.

We cannot fully concur in that part of the learned Chief Justice's charge to the jury, where he told them that if they were satisfied the accident would not have occurred if the defendants had erected and maintained sufficient fences upon the line of the route of the railway, to find for the plaintiff. It is evident that upon this direction the jury based their verdict and finding. The result of the decisions upon the question of contributory negligence is to shew that, assuming that it was the duty of the defendants, under the 9th section of 9 Wm. IV., ch. 29, to erect and maintain fences and gates at road crossings, that unless the injury the plaintiff sustained was the consequence of that breach of duty, and not the result of his own act or negligence, he cannot recover. Here the omission to fence or place gates was not the cause of the accident, but the injury was occasioned by the driver taking no care or caution whatever when about to cross the defendants' railway; and, in our opinion, the question for the jury was (if there was evidence to go to them of liability on the part of the defendants), whether the plaintiff's driver, by his own negligence, contributed to

the accident in such a manner that but for his want of reasonable care it would not have happened, and if the jury found such to be the case they should be directed to find for the defendants.

The rule must be allowed for a new trial, without costs.

Rule absolute.

BABAUN V. LAUSON.

Ejectment—Survey—Aliquot part of a lot—C. S. C. ch. 77, sec. 68.

In ejectment by the patentee of the south-east quarter of a lot, to try a disputed boundary, defendant owning the north-east quarter, the plaintiff's surveyor stated that he ran the east side-line of the lot, divided it into equal halves, and drew a line across the lot on a bearing corresponding to the concession line in the rear, and that of the quarter so ascertained defendant was in possession of eleven acres. He said, however, that he did not know the quantity in the whole lot, which fronted on a river, and there was a jog in the concession line in rear, for which he had made no allowance.

By the Survey Act, C. S. C. ch. 77, sec. 68, every grant of an aliquot part of a lot shall be construed as a grant of such aliquot part of the whole, whether more or less than expressed in the grant.

Held, that the plaintiff had not clearly shewn his right to the land claimed, and was therefore not entitled to succeed; but a new trial was granted instead of a non-suit.

EJECTMENT, for part of the south-east quarter of lot 18, in the front concession of Clarence, in the County of Russell.

The plaintiff claimed as patentee of the south-east quarter. Defendant claimed the part in dispute as part of the north-east quarter of the same lot.

The case was tried at the last Assizes at L'Original, before Hagarty, J.

The plaintiff put in his patent for the south-east quarter of lot 18, in the township of Clarence, and called Robert Sparks, P.L.S., who stated that he was employed to divide these quarters: that he ran the side line between lots 17 and 18, commencing at the River Ottawa, at an original post, the

lots numbering from east to west : that he ran back to the rear of the front concession, and found it 110 chains 53 links, and divided this into equal halves, and planted a post, and drew a line across the lot on a bearing corresponding to the concession line in the rear : that on the south-east quarter so laid off he found the defendants in possession of about eleven acres. He said he did not know the whole quantity contained in the lot : that there was a jog in the concession-line in the rear of the lot ; and he produced the plan made by him, shewing how he divided the lot. The descriptions for patents for both quarters, as quarter-lots, were put in, properly certified ; and he also stated that by his survey each quarter would have nearly three chains more than the reputed length by the descriptions.

It was objected by the Attorney General, for the defence, that the survey was not according to law : that the surveyor was bound to ascertain the whole quantity in the lot, as the Statute required an aliquot portion for the quarter.

During Michaelmas Term, *S. Richards*, Q.C., obtained a rule *nisi* calling on the plaintiff to shew cause why the verdict should not be set aside, and a non-suit entered, pursuant to the leave reserved ; or for a new trial, the verdict being against law and evidence, and for want of sufficient evidence at the trial to shew that the premises in question formed part of the south-east quarter of lot No. 18, as claimed by the plaintiff.

During this term, *C. S. Patterson* shewed cause ; and *Richards*, Q. C., supported the rule, citing *Doe dem Strong v. Jones*, 7 U. C. R. 388.

MORRISON, J., delivered the judgment of the Court.

It appears from the evidence and the plan put in by the plaintiff, and made by his surveyor, that lot 18 fronts on the River Ottawa, on a bend of the river ; that at the rear of the lot there is what is called a jog in the concession-line, which contracts the rear end of the lot to the

extent of over a chain and a half for a distance of over seven chains, so that in fact the west-half of the lot cannot be divided so as to give equal distances to the boundary lines of the south-east quarter and north-east quarter.

The plaintiff's surveyor, the only witness called, stated that he ran from an original post planted at the river between lots 17 and 18, on the proper course of the line between those lots, to the concession-line, striking it where it makes the jog, and made the distance 110 chains 53 links, and bisected that line at the distance of 55 chains and $26\frac{1}{2}$ links from the river, and planted a post on the north-east angle of the plaintiff's south-east quarter, and then ran a line across the half lot parallel to the concession-line, and between those lines he considered the south-east quarter to lie, and that the defendants were in possession of about eleven acres of that quarter lying contiguous to the north-east quarter. By that mode of survey, the south-east quarter would contain a considerable quantity of land more than the north-east quarter, viz., that rear portion of the half-lot which would be included within a line extended from the jog in the concession across the half-lot parallel to the rest of the concession-line, being a piece of land about seven and a half chains by nine chains.

The defendants contended they were entitled to have, as their quarter-lot, an equal share in quantity to the north-east quarter, under the 68th section of the Land Surveyors' Act, Consol. Stats. C. ch. 77, which enacts that "Every patent, grant, or instrument, purporting to be for any aliquot part of any * * lot or parcel of land, shall be construed to be a grant of such aliquot part of the quantity the same may contain, whether such quantity be more or less than that expressed in such patent, grant, or instrument."

The language of the clause is not happily expressed. An aliquot part is such part of a number, say of a lot of 200 acres, as will divide that number and measure it exactly without any remainder. In the case before us, four (the quarter) is an aliquot part of 200, but the Legislature, keeping in view that from errors in surveys a lot described

as containing 200 acres may within its boundaries on the ground contain a less or greater quantity than 200, provided that the grant of an aliquot part, such as a quarter, should be taken as a grant of such aliquot part of the quantity the lot may contain, whether such quantity be more or less than that expressed in the patent—in other words, if the lot on measurement should contain 240 acres, the quarter should contain 60 acres; so that in laying out the quarter of a lot a surveyor, in the event of the lot not being a parallelogram, as in this case, should first ascertain its contents, and then lay off an equal quantity to each quarter, having due regard to the position of the whole lot. In the case before us the surveyor bisected the division line between lots 17 and 18, where he planted a post as the north-east angle of the plaintiff's quarter. If he had, on the other hand, bisected the division line between the east and west halves of lot 18, and ran from that point the boundary between the two quarters, he would have placed the north-east angle of the plaintiff's quarter much further to the east, and in that case the plaintiff's quarter would not have covered all the land he now claims from the defendant; but bisecting either division line would not divide equally the half-lot.

If there had been no jog in the concession-line, the course adopted by the surveyor would have made about an equal division; but making no allowance for the jog, he necessarily gave to the plaintiff's quarter much more land than he is entitled to—nearly the amount in dispute.

As said by Sir John Robinson, C. J., in *Doe dem. Strong v. Jones* (7 U. C. R. 388): "In an ejectment brought on account of disputed boundaries, the plaintiff has to shew beyond reasonable doubt that he is entitled to a verdict for some land at least of which the defendant is in possession. Where the point is a doubtful one, as it is here, the plaintiff should be prepared to shew that he has had a survey carefully made, and that the proper steps have been taken which the law requires for ascertaining the exact position," &c.

We cannot say from the evidence that this plaintiff has made out a clear case that the defendants are in possession of part of the south-east quarter, and upon that ground we are of opinion that the defendants are entitled to the rule being made absolute for a non-suit. If, however, the plaintiff prefers, we shall direct a new trial, the plaintiff to pay the costs of the last trial,—the plaintiff to elect within one month.

CALVIN ET AL. V. THE PROVINCIAL INSURANCE COMPANY.

Agreement—Construction—Work and labor.

Defendants and another Company had insured a vessel, which was sunk while being towed by the plaintiffs for her owners. An agreement was then entered into between the plaintiffs and the two Insurance Companies, by which, after reciting that the liability for raising the vessel was undetermined, the plaintiffs undertook to raise her for a sum named, and it was agreed to submit to arbitration by whom such sum, and the other expenses of repairing the vessel, should be borne. After this the owners sued the plaintiffs for negligence in sinking the vessel, and recovered. The defendants refused to arbitrate, and the plaintiffs then sued them for work and labor.

Held, that they could not recover, for defendants had agreed only to pay in the event of the arbitrators deciding that they were liable, and it was not certain whether the plaintiffs were entitled to be paid at all.

The question as to the plaintiffs' negligence was left to the jury, and found in their favor: but, *Held*, that such question could not be tried in this action; and *Seemle*, that on the evidence the verdict was wrong.

THE declaration contained the common counts for work, labor, and materials, and for money.

Pleas. 1. Never indebted. 2. That the defendants had insured a vessel, the property of S. and H., for \$4250, against loss or damage by the dangers of the navigation of Lake Ontario and the River St. Lawrence: that while the policy was in force, S. and H. employed the plaintiffs to tow, by a steam tug of theirs, the said vessel from a place in the harbour of Kingston into the waters of the St. Lawrence, and that while the plaintiffs were employed

in this towage, the said vessel was by their negligence and default run against a pier in the harbour of Kingston, and by such negligence, &c., the said vessel was, while the said policy was in force, damaged and sunk: that the several causes of action in the declaration arose solely from the repairs made and work done by the plaintiffs to the said vessel in consequence of her being so damaged and sunk, and under an agreement by the plaintiffs with the defendants that the liability for the same should depend upon the fact whether the plaintiffs were so negligent as aforesaid or not; and that, if the plaintiffs were to recover in this suit for the said several causes of action, the defendants would be entitled to recover the same amount again from the plaintiffs in an action by the defendants against the plaintiffs for such negligence.

This plea was added during the trial, by order of Adam Wilson, J., who tried the cause, at Kingston, in March, 1867.

It was proved that the schooner *Rapid* owned by Stevenson and Harbottle, was insured by the defendants, and was, while loaded with stone to be delivered at Prescott, sunk in Kingston harbour.

Mr. Davidson, the agent and inspector for defendants, was sent by their manager to Kingston to see after her. After consultation with the manager and with the agent for the Home Insurance Company, who had also an insurance on the *Rapid* he made an agreement with the plaintiffs, dated 13th September, 1864, by which, after reciting that the liability for the expenses of raising the schooner was undetermined, it was agreed as follows: The plaintiffs undertook to raise and place her on the ways of the Kingston Marine Railway for \$3100, and it was further agreed to submit to the arbitrament of three arbitrators, one to be chosen by each party, and the third by those so chosen, by whom the payment of the said sum of money and the other expenses attendant on the repair of the said vessel should be borne, the arbitration to take place forthwith. This agreement was expressed to be made between

the plaintiffs of the first part and the defendants and the Home Insurance Company of the second part, and was signed by the plaintiffs, by Davidson for the defendants, and by "Robert Patterson, for the Home Assurance Company," but was not under seal.

The plaintiffs did the work required by the agreement. It was proved that they were in the habit of raising vessels, and that Mr. Davidson had been in the habit of contracting for their doing so, and that the defendants had paid for work done in pursuance of such contracts. Mr. Davidson sent a copy of this agreement to defendants' manager. The insurance of the *Rapid* by defendants was admitted.

After the making of this agreement, an action was brought by the owners of the *Rapid* against the plaintiffs for sinking her, and the defendants declined to arbitrate until that action was determined, and after it was determined in favour of the owners the defendants declined altogether to arbitrate.

A nonsuit was moved for, but was refused, leave being reserved to move. It was after this that the second plea was added, and the question was raised whether the loss of the *Rapid* was owing to the negligence or mismanagement of the plaintiffs.

The defendants then tendered in evidence an exemplification of a judgment recovered by Stevenson and Harbottle against the now plaintiffs for negligence in sinking the *Rapid*. Its reception was objected to, but the learned Judge admitted it to prove the fact that Stevenson and Harbottle did sue the plaintiffs, and did recover against them, but not as affecting the finding on the question of negligence in this suit, one way or the other. They also proved that the captain of the *Rapid* agreed with one of the plaintiffs to tow her (being heavily laden with stone) to Prescott. She was then at anchor, as the captain swore, about three hundred yards from Henderson & Holcomb's wharf, and lay there all night. The next day the wind blew very hard from N. N. E. The steam tug was at

Garden Island, and it was found necessary to get the help of the ferry boat to get the head of the tug from the wharf. The tug went alongside the *Rapid*, which was made fast to the tug on its port side, before the *Rapid's* anchor was raised, which was done when the two vessels were lashed together, and then they headed north for Kingston, and came towards Holcomb & Henderson's wharf. There was a sunken pier near this wharf, three or four posts of which, rising above the water, shewed its position. The captain of the *Rapid*, who was on the wharf, saw that they could not get the vessel's head round on account of the wind, and he stated that if the *Rapid* had been lashed on the starboard side of the steam tug she could have been more easily brought up to the wind. As it was, the *Rapid* struck the sunken pier, but just before the collision the engine of the tug was stopped, and then went on again, and the *Rapid's* bowsprit was run into one of two barges which were lashed side by side to the wharf. This witness said, that if, instead of going ahead, the engine of the tug had been reversed, there would have been no collision. The *Rapid* began to settle into the water, and he (the witness) told the mate in charge of the tug to take the *Rapid* out and then run her into shallow water, and he did back out and run her ashore; her bow struck before she sank at the stern. He swore that she might have been backed out before she struck the pier, which stove a hole in her about seven feet aft of the mainmast. He said that if a line had been carried from the *Rapid* to the wharf, as was ordered by the person in charge of the tug, it would have been of no use.

The mate, who was in charge of the *Rapid*, swore that, before heaving up the anchor, he warned the mate in charge of the tug of the danger of taking the *Rapid* in tow as he was doing, and that on board his vessel they obeyed whatever orders came from the tug, as when a tug is in charge all the orders come from on board her. He said that the *Rapid* was all ready to proceed down the

river : that the anchor was not raised until the two vessels were lashed together, and that when the steamer went ahead, and brought the bows of the *Rapid* round, the wind took effect on both. He said that when they were lifting the anchor, he was asked by the mate of the tug to put a line out to the dock, and that they tried to do so ; but it would have made no material difference, for it was to leeward of them. He said tugs frequently took more than one vessel.

Another witness, who said he had navigated the lakes twenty years, and had acted as a pilot, and knew Kingston harbour well, stated that the mistake was in trying to come in as they did : that they should have gone out and got more steerage way ; that he saw the whole affair, and he confirmed the testimony of the captain and mate of the schooner in many important particulars.

Several other witnesses gave similar testimony for the defence, and expressed their opinion that, if the engine of the tug had been reversed when it had been stopped before the collision, the danger might have been avoided.

In reply, the plaintiff called the son of the captain of the tug, who had been left by his father in charge of her on this occasion. He swore that he had been frequently in charge, and was mate of her for nine years : that he had received instructions from the plaintiffs' agent to take the *Rapid* in tow to Prescott, as well as a barge that was at Chaffey's wharf : that the *Rapid* was at anchor about seventy-five yards from Cowan's wharf, to which he was told to take her, and to leave her there until he could collect his tow ; that it was the practice to take a vessel to the wharf, and when the tow was collected to start. He said he ordered the mate of the *Rapid* to run a line to Cowan's wharf, and to heave up his anchor : that before the *Rapid* touched the barge, her mate called out to stop, and he stopped the engine : that he could not have got out by reversing, for if he had tried it he would have struck her stern against the sunken pier : that the headway did not entirely cease on the stopping the engine, but

that he did not put on steam and go ahead again; it was the force of the wind carried them against the barges. He explained how he was able to back out after the *Rapid* struck the barge. He also said that where the *Rapid* was at anchor there was not sufficient room to make her fast behind the tug; they usually allowed sixty fathoms for the tow-line; that people will not bring out their barges in order to be taken in tow: that they towed schooners first, the barges following: that, having a barge to tow, he had to take the *Rapid* into the wharf, otherwise he could have taken the *Rapid* directly towards Prescottt. He insisted that it would have been safe to take the *Rapid* in, the wind being as it was, if they had obeyed his orders about the line, and he said he thought it necessary for her safety to have the line to Cowan's wharf, and did not explain why he had the anchor up, and started to go ahead before the line was carried out.

Other testimony for the defence shewed that when they started, after heaving the anchor up, the tug did not answer her helm, and that, whether they took the schooner on the starboard or larboard side, the tug could not have turned her head towards Garden Island, owing to the wind and the want of headway; that if they had been in the middle of the river the tug could have managed the schooner; they would have had plenty of sea-room.

The witnesses for the defence differed in their account as to the reversing. The man who steered the tug said they could not stop her, or give her stern-way, until they got to the barges; that if the engine had continued reversing, and they did reverse, the wind would have thrown them on the top of the pier. He also stated that a boat did leave the schooner with a line, but this was after the anchor was tripped.

Another witness said that the distance from the barge which the schooner ran foul of was eighty or ninety feet. He first observed them coming in when they were about fifty feet from the barges, and about thirty feet from the sunken pier; but they could not then have reversed and

got out without striking the sunken pier, because, before stern-way could be got, the vessels were making leeway with that wind blowing; but he said they could not at that time have struck the stern of the schooner against the sunken pier by reversing, for the stern of the schooner at that time was thirty feet, or forty, beyond the pier.

There was a conflict of testimony as to whether the schooner struck the sunken pier before or after she ran foul of the barge.

The learned Judge left it as a question of fact to the jury, whether the taking the *Rapid* into Cowan's wharf was according to the usual course of business, or, as it was called, custom, in taking vessels in tow to go down the St. Lawrence; or, even if it were not an established custom, whether those in charge of the schooner did not acquiesce in that course being pursued upon this occasion; and he left the question of negligence to them on the whole evidence.

The jury found for the plaintiffs for the amount claimed, \$3100; and that there was a custom to take vessels to the wharf till those which are to be towed are collected together; and that whether there was such a custom or not, the mate in charge of the schooner acquiesced in being taken to the wharf.

In Easter Term, 1867, *J. H. Cameron*, Q. C., obtained a rule, calling on the plaintiff to shew cause why there should not be a nonsuit entered, pursuant to leave reserved, on the grounds that the contract, in order to bind the defendants, should have been made under seal; that the claim is founded on the writing, according to which defendants were to be liable only on a certain event, which has not taken place; that defendants, not being owners, are not liable for work, labour, and materials furnished or done to another person's ship, in an action on the common counts, and the work and materials are not things which it is a part of defendants' ordinary business to contract for. Or why a new trial should not be granted, for misdirection

upon the legal points involved in the motion for nonsuit, and in ruling that the special contract need not be declared on; and for not directing that there was no evidence to shew a custom binding on the owners of vessels, that a tug hired to tow them down the St. Lawrence from anchorage outside the wharves might first take them into and alongside the wharf in the harbour, in order to collect other vessels to be towed at the same time, and that as the injury to the *Rapid* happened while she was so being taken to the wharf, the plaintiffs were not responsible; and in telling the jury that there was evidence of consent to the taking in the *Rapid* in this way; and that he should have told the jury that the plaintiffs, having taken the *Rapid* in tow, should have proceeded directly with her down the river; and for refusing to leave the judgment recovered against the plaintiffs by Stevenson and Harbottle to the jury as evidence that the injury to the *Rapid* arose from the plaintiffs' negligence; and in refusing to allow a witness to be asked, "Have you any doubt that it was the mismanagement of the tug that caused the injury to the plaintiffs' vessel?"; and that the verdict was against law and evidence on all the foregoing grounds.

In Michaelmas term *M. C. Cameron*, Q. C., shewed cause.

J. H. Cameron, Q. C. (*W. H. Burns* with him), supported the rule, citing *Torrance v. Hayes*, 2 C. P. 338, 3 C. P. 274.

DRAPER, C. J., delivered the judgment to the Court.

The declaration is for work, and labour, and materials, found by the plaintiffs for the defendants, and at their request, to which never indebted is pleaded. There is a second plea, which need not be referred to in considering that part of the rule relative to the entry of a nonsuit. Assuming that the plaintiffs did the work and provided the materials, and that the price was fixed, of all which there was sufficient evidence, the question is, was all this for defendants, and at their request? For if not the nonsuit should be granted.

We do not find in the evidence any statement as to the plaintiffs' general business or employment, but it appeared they were possessed of the necessary means and appliances for raising a sunken vessel; also, that they had steamboats or tugs, which were employed in towing vessels up and down the St. Lawrence. One of these steam tugs was employed to tow a schooner called the *Rapid*, belonging to the firm of Stevenson and Harbottle, from Kingston, off which city she was lying at anchor, down to Prescott. The *Rapid* was loaded with stone. The defendants are an incorporated Insurance Company, and had granted a policy of insurance on the schooner to her owners, against the risks of the navigation. There was another Insurance Company which had granted a similar policy. In the towing of the *Rapid*, by the plaintiffs' tug, close into a wharf at Kingston, before going directly down the river, the *Rapid* struck against a sunken pier, and soon after sank.

It seems to have been undisputed, on the part of the insurers, that this was one of the perils insured against, and the defendants, as soon as they had notice of the disaster, sent their agent to enquire into the circumstances, and see what it was best for their interests to do. On this enquiry it became a question whether the plaintiffs had not caused the mishap to the *Rapid* by their negligent and unskilful management in towing her, so that they were liable to her owners for the loss and damage sustained. In the mean time, and until the question could be determined, it seemed to be for the benefit of all parties interested that the *Rapid* should be raised, in order that she might be repaired with as little delay as possible, and thereupon the agreement put in evidence by the plaintiffs at the trial was made. It purported to be between the plaintiffs, of the first part, and the two Insurance Companies, of the second part, and was signed by one of the plaintiffs in the name of the firm, and by an agent of each of the Insurance Companies, and was not under seal, and it was thereby agreed that the plaintiffs should raise and place the *Rapid* upon the Kingston marine railway for

\$3100, and that it should be left to three arbitrators to determine by whom that cost, and the other expenses attendant on the repairs of the vessel, should be paid or borne. It is not even stated that if the award is against the plaintiffs they are to have no claim, nor that if it is against the insurers that they jointly or severally, and if severally in what proportions, would pay the stipulated sum to the plaintiffs. This was left to be inferred from what was expressed in the writing. The only additional stipulation was that the arbitration should take place forthwith. This agreement is dated 13th September, 1864.

The plaintiffs did raise the schooner according to this agreement, and on the 4th January, 1865, her owners commenced an action against the now plaintiffs for negligence in towing her, *per quod* she was damaged and sunk. In November following this action was tried, and the jury found against the now plaintiffs, and on the 16th of March, 1867, judgment was entered on this verdict. At some time, not appearing when, after this action by the owners was begun, the defendants refused to arbitrate; it was, however, as we understand, before the plaintiffs brought this action.

Now, assuming that the instrument was so executed as to be binding on the defendants, what was their agreement? The plaintiffs agreed to do certain work, the price or value of which was fixed by both parties. The defendants, together with the other Assurance Company, agreed, on a named event, to pay that sum for the work, and that event has not happened. There was an act to be done by each of the two parties, the appointment of an arbitrator; the arbitrators were to appoint a third; by their award it was to be determined whether the defendants and the other Insurance Company should or should not pay to the plaintiffs the \$3100. The defendants have refused to appoint an arbitrator, and the plaintiffs acquiesce in that refusal, and bring this action.

Now, if the defendants had agreed to refer the value of the work to an arbitrator, admitting they were liable to

pay for it, there would be no difficulty in holding that an action like the present would lie. But there is not a word in this agreement by which the defendants admit liability for the raising or repairs, or contract that they will pay the plaintiffs anything until that question of their liability is decided. To found a claim upon the agreement, an award must be shewn. It would be as reasonable to bring an action upon an arbitration bond conditioned to obey, &c., an award, before the award is made, as to hold that on this agreement an action could be maintained under the circumstances.

The plaintiffs, however, have not declared upon the agreement. They have used it as evidence to establish the stipulated price to be charged for the raising the schooner, and to shew further that the agreement of the defendants to name an arbitrator has been repudiated; and hence they argue that they may recover on the common counts, because the plaintiffs have done the work, and the special contract may be considered as waived or rescinded by both parties.

No doubt there are numerous cases which shew that where something has been done under a special contract, but not so as to amount to strict fulfilment of the conditions thereof, and the party with whom that contract was made has derived benefit from what has been done, a promise will be implied to pay according to the value of the benefit received, and an action on the common counts is maintainable. But to seek to recover upon that ground in the present case is really to beg the whole question. In cases such as I have referred to, and of which many well selected instances are to be found in the notes to *Cutter v. Powell* (2 Sm. L. Cas.), there is no question as to the party for whom the work was done; the special contract will shew that the defendant contracted to pay if the plaintiff fulfilled his part. But here the contract does not state in terms that the plaintiffs were to do the work for the defendants, and it never was intended to do so. The question for whom the work was to be done was left open, and it

might be found that the plaintiffs were working to relieve themselves from liability, and not for the benefit or at the instance of defendants. The contract itself does not help the plaintiffs. The defendants were not the owners of the schooner; she had not been abandoned to them by the insured; they were not in possession of her, nor have they received her from the plaintiffs after the fulfilment by them of the agreement to raise her.

It was, indeed, said during the argument, that the question as to the party for whom the work was done was for the jury, and it seemed to be assumed that if it was once conceded or established that Mr. Davidson's signature of the contract was binding on the defendants, the plaintiffs had a right to recover on this form of declaration, only proving further that they had raised the schooner and placed her on the marine railway, and that the defendants had refused to arbitrate. If the plaintiffs were in the position that they were certainly entitled to be paid for the work done, the case would assume a different aspect. That is really the point in dispute, for the defendants appear to us, indirectly at least, to admit that if the loss is not one which the negligence of the plaintiffs occasioned, and for which they were bound to make compensation, then they (the defendants), being liable on their policy to the owners, were willing to pay for it; and this question they agreed to submit to arbitration. From that agreement they have withdrawn, contending that by the result of the action brought by the owners against the plaintiffs, it is shewn that the damage has arisen from the plaintiffs' own fault. We cannot see our way to the conclusion that this question can be tried on the present pleadings.

If our inclination were not so strong against the plaintiffs on this point, we should feel it right to order a new trial. We have spent a good deal of time in a careful consideration of the evidence, and we cannot say we think the verdict satisfactory. Some of the grounds, however, taken as exceptions to the ruling at *Nisi Prius* are not contained in the learned Judge's report, and were not, as

far as I remember, mentioned when the rule was moved, while others were in fact merely formal rulings, and were involved in the leave reserved to move for a nonsuit. But we have felt much impressed with the consideration, that the plaintiffs' principal witness to repel the charge of negligence, states a very decided opinion that it was necessary there should be a line from the schooner to the wharf, in order, with the wind that was blowing, to take her safely in, and therefore he ordered this to be done; and yet, without waiting to see that his orders were complied with, he has the anchor raised, and moves the schooner in; and further, that he, in charge of the two vessels, while towing the schooner, stops the engine, not in the exercise of his own judgment, but because the mate of the schooner, who was under his orders, called out to him to do so, and did not then, and when, according to his own testimony, there had been no collision with the sunken pier or the barges, reverse his engine and try to back out. There are many other points arising on the evidence which lead to the same result, but it is in our opinion unnecessary to pursue them, as in our judgment the rule to enter a nonsuit should be made absolute.

Rule absolute.

FIELDS V. MILLER.

Description of land—Construction—Falsa demonstratio.

In 1792 lot 17 in the second concession of Harwich was appropriated by the Land Board for the District of Hesse to James O'Brien. He had made no improvements however up to 1794, and in 1853 the location made to him by the board was formally cancelled.

In 1801 a patent issued to F. for 17 in the front concession of Harwich, which had been appropriated to him by the Land Board about a year after their grant to O'Brien, described as commencing in front of the concession, at the N. E. angle of the lot, on the river, *then S. 45° E. 80 chains, more or less, to the lands of James O'Brien; then S. 45° W. 30 chains, more or less, to lot 16; then N. 45° W. 68 chains to the river; then along the water's edge north-easterly to the place of beginning, containing 200 acres more or less.* Up to this time there had been no second concession line run.

In 1863 the Crown granted to defendant the rear part of the lot, 188½ acres, and the plaintiff, claiming it under the patent to F., brought trespass.

Held, that as O'Brien never got a patent or became entitled to claim one, the reference to his land was *falsa demonstratio*, and that the plaintiff was confined to the distance of 80 chains mentioned in the patent to F.

TRESPASS *quare clausum fregit*, being that part of lot 17 in the first or front concession on the Thames, in the Township of Harwich, commencing at a point on the line between lots Nos. 16 and 17, 83 chains 95 links from the river Thames; thence along the said side-line south 45° east 49 chains 91 links, to the rear of said lot number 17; thence along the allowance for road in rear thereof north 45° east 39 chains 12 links, to the eastern side-line of said lot number 17; thence along said eastern side-line between lots Nos. 17 and 18, north 45° west 50 chains 45 links to a point; then across the said lot to the place of beginning, containing 200 acres, more or less; and cut and carried away the plaintiff's saw logs.

Pleas—1. Not guilty. 2. The land not plaintiff's. 3. That excepting that portion in the possession of the Great Western Railway Company at the time of the alleged trespass, the land was defendant's.

Issue.

The trial took place at Chatham, in October, 1867, before Morrison, J.

The plaintiff put in an exemplification of letters patent granting lot No. 17, in the front concession of Harwich, to

Nathan Fields, in fee. The lot was therein described by metes and bounds as containing 200 acres. The patent bore date 10th August, 1801. The description commenced at a post planted in front of the said concession at the north-east angle of the lot on the river Thames, then south 45° east 80 chains, more or less, to the lands of James O'Brien; then south 45° west 30 chains, more or less, to No. 16; then north 45° west 68 chains to the river Thames; then north-easterly along the water's edge to the place of beginning, with allowance for roads.

Also a certified extract of minutes of the Land Board of the District of Hesse: "At a meeting of the Land Board of the District of Hesse, at the Council House at Detroit, on Friday 28th September, 1792, Lieutenant-Colonel England, President, John Askin, Esq., Louvigny Montigny, Esq., members. James O'Brien, petitioner for lot 17, second township second concession south side river La Tranche, having appeared, the board grant him said lot, having administered the oath of fidelity and allegiance to him as by law directed." Signed by the President and members.

Also the will of Nathan Field, dated 23rd March, 1820, whereby he gave lot No. 17, in the front concession of Harwich to his wife for life, and afterwards to his son Nathan in fee. The execution was sufficiently proved. The testator died in 1824: his widow died four or five years before the trial.

Also a deed dated October, 1864, made between George Fields, yeoman; Catherine Scarlett, widow; Daniel Fields, yeoman; Rebecca Traxler, widow; Peter Fields, yeoman; Henry Fleming, yeoman, and Hannah, his wife, of the first part; and Nathan Fields (the plaintiff), of the second part, whereby, in consideration of \$100, the parties of the first part grant, bargain, sell, &c., to the party of the second part, his heirs and assigns, No. 17, front concession of Harwich, commencing where a post has been planted in front of the said concession, at the north-east angle of the said lot on the river Thames, then south 45° east 80 chains, more or less, to the lands formerly patented or described

for a patent to James O'Brien; then south 45° west 30 chains, more or less, to Lot No. 16; then north 45° west 68 chains to the river Thames; then north-easterly along the water's edge to the place of beginning.

It was proved that the grantors were the sons and daughters of Nathan Fields, the grantee of the Crown, and the brothers and sisters of the plaintiff.

A verdict was by consent rendered for the defendant, with leave reserved to the plaintiff to move to enter a verdict for him with \$676 damages; the Court to have full power to draw inferences and find facts as a jury might do; the Court also to have the original documents from the Crown Land Department for their inspection.

In Michaelmas Term *Douglas* obtained a rule accordingly.

Hector Cameron and *Atkinson* shewed cause, citing *Doe Murray v. Smith*, 5 U. C. R. 225; *Fields v. Livingstone*, 17 C. P. 15; *Iler v. Nolan*, 21 U. C. R. 309.

Becher, Q. C., and *Douglas* supported the rule, and cited *Anstee v. Nelms*, 1 H. & N. 225; *Harrison v. Hyde*, 4 H. & N. 809; *Henderson v. Harris*, 10 C. P. 374; *Jamieson v. McCollum*, 18 U. C. R. 445; *Llewellyn v. Earl of Jersey*, 11 M. & W. 189; *Tay. Ev.*, 4th Ed., p. 1029; *Broom Leg. Max.* 569.

DRAPER, C. J., delivered the judgment of the Court.

After going through the mass of papers put before us in this case, I have endeavoured to extract those facts upon which my opinion is founded, as they appear to me to be sufficiently established in evidence.

I cannot help saying that I have lost a great deal of valuable time in perusing numerous letters and other papers put in, as I understand, for the first time at or after the argument. I have not ascertained who put them in, but I suppose they were thought to come within the description of original documents from the Crown Land Department. If they had been examined by the counsel on either side, and only those which could be of any service and

were admissible as evidence had been selected, I should have been spared the reading of nine-tenths of them, or perhaps even more. There were from twenty to thirty letters of the defendant among them.

It appears that on the 28th September, 1792, one James O'Brien petitioned for Lot No. 17, second township south side river La Tranche. The minute of the Land Board for the district of Hesse states that the Board on that day granted it to him, by which I understand that he became authorized to take possession, build, &c., that he might on fulfilling the required conditions obtain letters patent granting the lot to him. The second township was afterwards named Harwich, and the river La Tranche was subsequently called the Thames. In January, 1794, McNiffe, a deputy surveyor employed by the Crown, made a return of the improvements of lots in this township, in which he put No. 17, in the name of James O'Brien, "No improvement." With the exception that the name James O'Brien is entered on some of the maps now in the Crown Lands Office, nothing more appears with regard to him until the 18th April, 1853, when this location made by the land board was by Order in Council formally cancelled.

As early as the 4th April, 1793, an instruction was issued by the Surveyor General, that a magistral line should be protracted in each of the townships on the river La Tranche, to obviate the inconvenience of the concession-lines running in parallel curves to the bends of the river. Nevertheless, on the 24th November, 1798, on the 27th November, 1798, and on 17th May, 1802, patents issued granting No. 19, No. 18, and No. 16, in the front concession of Harwich, in each of which the line or limit farthest from the river is described as "parallel to the said river." I presume that the descriptions were furnished from the Surveyor General's Office.

In regard to Harwich (as also to other townships fronting on the Thames) the survey was commenced by planting posts along one bank of the river from which the side-lines of the lots in the townships on each side were to be after-

wards run. The general course of the river was reported by McNiffe, and in scaling or ascertaining it these posts were planted. Deputy Surveyor Iredell was by letter from the Surveyor General of the 14th November, 1795, directed, among other things, to run three concessions in Harwich. The letter of instructions to him of the 14th January, 1796, recognized as a fact that previously to that date lots had been assigned to settlers, and required him not to interfere with or curtail any such locations. He was to run the side-lines "from the stations" (*quære*, the posts planted) "which divide the lots on the banks of the river," north-west and south-east. This done, he was to draw a concession-line across the township at right angles to the side lines, "so as to let it be a tangent to that course of the river which breaks most in upon the township, *taking care that it does not intersect any part of the river*. The intersection then which this tangent makes with the nearest side-line to the point of contact on the river will give the first station to commence and regulate the work by, and from thence you must give the distance of the concession, the tangent being the base or magistral line of the township. * * When it so happens that the curves of the river bend from the magistral line outwards (and of course from the body of the township) and thereby leave space enough for two lots or upwards between the magistral line and the river, one or more lots may be taken off from and adjoining without the base-line, by running short and broken concessions between the bends of the river, leaving any overplus land not being a full lot attached to the lot nearest the river."

Letters patent, dated 10th August, 1801, issued, granting to Nathan Fields No. 17, in the front concession of Harwich. The land board had, on the 20th September, 1793, upon his petition "granted" this lot to him, just about a year after O'Brien's application was granted. In this patent the land was described as commencing in front of the said concession at the north-east angle of the lot on the river Thames; then south 45° , east eighty chains, more or less, to the lands of James O'Brien; then south 45° west thirty

chains, more or less, to lot No. 16; then north 45° west sixty-eight chains to the river Thames; then north-easterly along the water's edge to the place of beginning, with allowance for roads.

It does not appear when the whole township of Harwich was surveyed. It would seem to have been done by piecemeal. It is not even proved when the survey of the three concessions referred to in the Surveyor General's instructions of 14th November, 1795, was made. Iredell's report of 1st December, 1803, shews that at that date the front and rear boundary lines of many of the townships had not been established, and that in Harwich, among several others, "there had been no second concession line run;" and he asks whether he is "to survey any lands that have been granted by the Crown to individuals," or only in such instances where the patent is produced.

The tracing of the part of Iredell's map containing the lots from No. 13 to No. 19 inclusive, shews that No. 17 was in a curve of the river projecting outwards, and so far from the "magistral" line that there was sufficient space for two lots between it and the river; and Iredell, following his instructions, ran two short and broken concessions, marked on his plan as concessions A. and B. In the description of No. 17, as set out in the grant to Nathan Fields, the lot is stated to be in the *front* concession. This is accurate as regards the fact that the township fronted on the Thames and this lot commenced at a post planted on the river, inaccurate if any other meaning is attached to the term front concession. Clearly the word *front* cannot be construed to mean *first* in regard to the plan of survey contemplated by the instructions, or the mode in which Iredell executed them, according to which the first concession would be next to the magistral line on the side furthest from the river. To agree with Iredell's map the land should have been described as being in broken concessions B. and A.; still the description commencing at the post on the river is enough.

If, therefore, the grant to Nathan Fields had not con-

tained the words "to the lands of James O'Brien," the case is too plain to afford a tenable ground of litigation. For the point for commencing the survey of the lot is not disputed; the width of the lot is the space between the posts which mark the adjoining lots 16 and 18, and the returning line parallel to the first goes back to the river. The contents stated by Deputy Provincial Surveyor Arthur Jones are 290 acres, the grant being in terms for only 200.

The only question is as to the effect of the words "to the lands of James O'Brien." These words, I have no doubt, were introduced to prevent any dispute, if it should happen that the distance mentioned in the patent to Nathan Fields—viz., eighty chains from the post on the bank—should extend into and beyond the limits of number seventeen, second concession, which the land board had assigned to O'Brien a year before they made the location to Fields. But it now appears O'Brien never completed his right to a patent from the Crown, and that the land never did become his. McNiffe's return shews that up to January, 1794, the land was unimproved, and it continued vested in the Crown until granted to the defendant on the 21st of December, 1863, as containing $188\frac{1}{2}$ acres, which the plaintiff now claims in addition to the 290 which he already has (a). The words "to the lands of O'Brien," are consequently *falsa demonstratio*; there were no lands of his; and if it could be held that the words may be treated as "to the lands assigned to or located to James O'Brien," I have seen no reason for holding that they would not be found to be identical with those granted to the defendant, at all events in their boundary nearest the river. But the object which the distance of eighty chains

(a) Defendant's patent was dated 21st December, 1863, and granted to him the rear or south-east part of lot 17 in the first concession or second range from the Thames, with the exception of the lands set off and taken by the Great Western Railway for the purposes of their road according to the description and plan of survey by Provincial Land Surveyor Arthur Jones, dated 20th May, 1861, of Record in the Crown Land Department, containing $188\frac{1}{2}$ acres, more or less.

or thereabouts was to reach having no existence, the plaintiff is limited by the only other certain guide afforded, that is, the distance, and cannot exceed it. The cases which decide that where a line is to run a stated distance to a defined object natural or artificial, and the actual distance is greater or less than the distance stated, the object, not the distance, must prevail, have consequently no application to this case.

Besides, the words "to the lands of James O'Brien" are to be taken in connection with the land board certificate of September, 1792, which assigns to James O'Brien, No. 17, second concession, south side of the river Thames, second township, or Harwich. The second concession may or rather must be that which adjoins the front concession, and No. 17 in the front concession begins on the river at a fixed point, and runs a named distance, where it was expected and intended the second concession should begin, and one may justly assume that if the lot assigned to James O'Brien had been described, it would have begun at the same distance from the river as the lot in the front concession extended to, and we know that distance from the patent to Nathan Fields.

I have felt it unnecessary to pay any attention to the Sheriff's sale of the lands claimed by the plaintiff, upon a writ of *fi. fa.*, founded on a judgment recovered in 1823, though I could not help noticing that the judgment is on a declaration in debt on bond, stating no condition; that the plea is *nil debet*, on which issue is joined: that the verdict is that the bond is the deed of the defendant, and that the damages are assessed at about half the amount of the bond as stated, for which damages, and not for the debt, the judgment is entered. Nor have I adverted to the evidence shewing a mortgage of this same lot made by Nathan Fields, dated the 14th of February, 1808, the day of the date of the bond declared upon. They were not adverted to in the argument that I remember, and they do not affect the construction and effect of the letters patent of the 10th of August, 1801, upon which, conceding

the plaintiff's title to whatever land it covers, I found my conclusion that the rule should be discharged.

Per Cur. Rule discharged.

MEMORANDA.

During this Term the following gentlemen were called to the Bar:—WILLIAM BARRETT, ALEXANDER GOFORTH, ZEBULON AITON LASH, WILLIAM BELL, WILLIAM MULOCK, WILLIAM BARCLAY McMURRICH, JAMES DINGWALL, GEORGE FREDERICK HARMAN, EDISON BALDWIN FRALECK, FRANCIS ALEXANDER HALL, WILLIAM HENRY MOORE, NICHOLAS SPARKS.

IN THE COURT OF ERROR AND APPEAL.

WIDDER V. THE BUFFALO AND LAKE HURON R. W. CO.

Action on award—Plea of fraud—Admissibility of evidence not before arbitrators.

Arbitrators having awarded compensation to the plaintiff for injuriously affecting his land, to an action on the award defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was made by the fraud of the plaintiff and the arbitrators. The land in question was situate upon a navigable river, running down to high water mark, and defendants' railway was built upon cribs in the river, cutting him off from access to the water, which was the injury complained of.

The jury were directed that if the plaintiff contended before the arbitrators that by law and under his deed he had such an exclusive right to the water in front of his land as would entitle him to damages, when he had not, this was evidence of fraud under the plea. *Held*, affirming the judgment of the Court of Queen's Bench, that this was a misdirection. That Court decided that no evidence of the value of the land and the injury done to it which was not offered at the arbitration could be admitted in support of the plea. *Per Richards, C. J., Adam Wilson, J., Morrison, J., and John Wilson, J.*, such evidence could not be wholly rejected. *Per Draper, C. J., Spragge, V. C., and Mowat, V. C.*, it was not admissible.

APPEAL from the judgment of the Court of Queen's Bench making absolute the rule *nisi* for a new trial, without costs—reported in 24 U. C. R. 520.

The action was upon an award made by arbitrators appointed under "*The Railway Act*," Consol. Stat. C. ch. 66, to determine the compensation to be paid to the plaintiff for damages to certain lands injuriously affected by the construction of defendants' railway, and by which the sum of \$10,000 was awarded to the plaintiff.

Defendants, among other pleas, pleaded, eighthly, on equitable grounds, that the sum awarded was "excessively and fraudulently exorbitant; and the said supposed award was made by the fraud, covin, and misrepresentation of the said plaintiff and of the arbitrators making the same."

To support this plea, evidence of several witnesses was

received at the trial to prove that the sum was grossly excessive. None of these witnesses had been examined before the arbitrators, although they could have been called then as well as at the trial, and the award was sustained by the only witnesses produced at the arbitration, whose credit was unimpeached. No actual fraud was proved, and the arbitrators being sworn denied any improper motive. The Court of Queen's Bench held that under these circumstances this evidence of value, which was objected to at the trial, was improperly received.

The injury complained of being the construction of defendants' railway on a navigable river in front of the plaintiff's land, which extended to high water mark of the river, the jury were told that if the plaintiff urged before the arbitrators that he had an exclusive right to the water, when he had not, it was evidence in support of the plea. This was held by the Court below to be a misdirection, and (the jury having found for defendants) upon these two grounds, among others, the verdict was set aside.

The defendants thereupon appealed.

January 3rd and 4th, 1866.—*Strong*, Q. C., and *M. C. Cameron*, Q. C., for the appellants, contended that the evidence was admissible, and even if not, that the other circumstances in the case were sufficient to go to the jury in support of the eighth plea.

J. H. Cameron, Q. C., and *C. Robinson*, Q. C., contra.

The other questions decided in the Court below in the judgment appealed from, and upon the application for a *Mandamus*, 23 U. C. R. 208, and on demurrer, 24 U. C. R. 222, were also discussed, but as no judgment was given upon them they are omitted here.

February 1st, 1868.—The following judgments were delivered :

RICHARDS, C. J., C. P.—This action was brought on an award made by two of the arbitrators appointed under the authority of Consol. Stat. C., ch. 66, entitled "An Act Respecting Railways." The arbitration was entered upon

in virtue of a mandamus granted by the Court of Queen's Bench, on the application of the plaintiff. The defendants contended that as they had not taken any of the plaintiff's land, or injuriously affected it, they were not bound to go into an arbitration for the purpose of ascertaining if the plaintiff had sustained damages in consequence of the construction of the railway. The Court of Queen's Bench, acting on the authority of decided cases in England, granted the mandamus compelling the defendants to name an arbitrator under the Statute.—See *Regina v. The Buffalo and Lake Huron R. W. Co.*, (23 U. C. R. 208.) It is suggested that the case of *Ricket v. The Metropolitan Railway Co.* (L. R. 2 H. L. 175) virtually overrules the former decisions, under the authority of which the Court of Queen's Bench acted, and shews that the plaintiff was not entitled to any compensation whatever.

The arbitrators named by the plaintiff and defendants not agreeing as to the appointment of the third arbitrator, he was named by the County Judge. The three arbitrators met, were sworn in, and entered on their duties, and having examined a number of witnesses on behalf of the plaintiff, the defendants gave a notice of desistment under the Statute, after which the Company's arbitrator withdrew. The other two arbitrators notified him they should proceed with the reference; they did proceed, and awarded the plaintiff ten thousand dollars.

The evidence given before the arbitrators, as I understand it, shewed that the plaintiff was the owner of a lot of land which was bounded by high-water mark on the River Maitland. That portion of his land adjacent to the river was a high bank, very steep. The works of the defendants were in the river itself; they took no part of the plaintiff's land. The injury claimed to be done to the plaintiff was that by making certain improvements on his land, if the railway had not been constructed in the river, he would have had sites for warehouses, from which access would have been had to the river, and for such purposes the land would have been very valuable: that he was therefore

entitled to claim from the Company the value of his land, estimated by different witnesses at from \$40 to \$60 per foot front on the river, the distance being about 466 feet, the distance which these lots were to stand back from the river, as I understand, being about eighty feet. The bank owned by the plaintiff was 115 feet above the level of the stream, the angle 30° . The plaintiff, besides making considerable excavations for the site of the warehouses, would have been obliged to expend a large sum of money in making a road to approach the site of the intended warehouses, and before they could be made available to any great extent the river would have to be dredged, and it would be necessary that the parties occupying the warehouses should have access to the river.

The plaintiff sued the defendants on the award. They filed various pleas, some of which were demurred to, and the demurrers decided in their favour, whilst others were decided in favour of the plaintiff. In the view I take of the matter it is not necessary to refer particularly to the pleadings further than the eighth plea, which is as follows :

“ And for an eighth plea to the first count, upon equitable grounds, the defendants say, that the sum awarded in and by the said supposed award in the first count mentioned, to be paid to the plaintiff by the defendants as a compensation for the injuriously affecting the plaintiff's land by the construction of the defendants' railway, is excessively and fraudulently exorbitant, and the said supposed award was made by the fraud, covin, and misrepresentation of the said plaintiff and of the arbitrators making the same.”

During the trial before Mr. Justice John Wilson, at the London Assizes, held in the spring of 1865, the plaintiff's counsel contended, amongst other things, that the defendants should not be allowed to lay before the jury evidence as to the value of the land other than that given before the arbitrators. The charge of the learned Judge was also objected to, on the ground that he stated to the jury “ that the plaintiff had no right to assume he had the exclusive right

to the water, and if he urged that so as to get large damages, this was a misrepresentation which might be taken in support of the eighth plea.

I do not advert to the objections to the ruling of the Court below on the other points raised by the defendants, as I am not prepared to dissent from them.

The majority of this Court is of opinion that the ruling of the learned Judge who tried the cause, that the plaintiff contending before the arbitrators that by law and under his deed he had such an exclusive right to the water in front of his land as would entitle him to recover damages against the defendants was evidence of fraud under the eighth plea, was erroneous; and as that may have had the effect of inducing the jury to find for the defendants, there ought to be a new trial on this ground.

On the other ground, as to the improper reception of evidence of facts not laid before the arbitrators, I dissent from the views on that point expressed by the learned Judge who gave the judgment in the Court below.

This reference being under the special powers of an Act of Parliament, does not come under the provisions of the Statute of 9 & 10 Wm. III. ch. 15, and the defendants could not apply under the provisions of that Act to set aside the award, even if they could have shewn gross misconduct and corruption on the part of the arbitrators. The remedy before the Statute of William was by filing a bill in Chancery, and I suppose the defendants, by setting up the fraud in a plea by way of equitable defence, may raise the same questions in the same way as if an application were made to set aside an award under the Statute, the effect of the equitable plea being to cast upon the jury the decision of the matters of fact which in Chancery is undertaken by the Court.

It is urged upon us, and no doubt there is much force in the argument, that if facts other than those placed before the arbitrators are given in evidence under this plea of fraud, and are to be considered by a jury, gross injustice may be done the arbitrators, and they may be convicted

of fraud for deciding in one way, when if they had had the new evidence placed before them they might have come to an opposite conclusion.

I think it is the every day practice, in moving to set aside awards in Courts of Common Law, to disclose the merits of the case, and shew in the fullest manner all the facts, not with a view of saying that the arbitrators had not decided correctly on the evidence before them, but for the purpose of seeing how far, taken in connection with the facts shewn to have been in evidence before the arbitrators, they may be considered as having been guilty of fraud or misconduct.

In *Russell on Awards*, edition of 1864, p. 108-9, the rule is thus stated, and I believe stated correctly: "In conducting the reference the first duty of an arbitrator is to be incorrupt and impartial. If there be any ground for imputing corruption, fraud, or partiality to him, the award cannot stand. Though the Court will rarely review the *bonâ fide* exercise of the arbitrator's authority, yet evidence of the merits will always be let in, so far as it may throw light upon his conduct with reference to the above imputations, but to induce the Court to interfere with the award on the ground of misconduct of the arbitrator there must be something more than mere suspicion." At page 698, "Though no bill lies to set aside an award on a question of fact decided by the arbitrators, yet evidence of the merits will be let in, so far as it throws light on their conduct."

There is no doubt that there may be misconduct in an arbitrator sufficient to set aside an award, which would not necessarily be considered as amounting to moral fraud.

In *Phipps v. Ingram* (3 Dowl. 669), an arbitrator refused to examine the plaintiff's witnesses. It was stated in one of the affidavits that the arbitrator was living at defendant's house. There were other circumstances referred to for the purpose of shewing that he unduly favoured the defendant. The rule was moved to set aside the award

for the misconduct of the arbitrator. Lord Abinger said, "There is no imputation upon Mr. Stocken's character, but I think he was bound to examine the plaintiff's witnesses." Parke, Baron, said, "There is no misconduct, in the bad sense of the word."

In *Ashton v. Pointer* (2 Dowl. 651), Parke, Baron, said, "You cannot move on the facts, unless so glaringly wrong as almost to amount to misconduct in the arbitrators." Alderson, Baron, said, "Anything amounting to misconduct would be a ground on which to move to set aside an award."

Where arbitrators made a mistake indicating a gross act of carelessness, the Court held it misconduct in a *judicial* sense, though not in a moral point of view, and set aside the award.—*In re Hall and Hinds* (2 M. & G. 847).

The authority of this case is doubted in *Phillips v. Evans* (12 M. & W. 309–312); yet it is affirmed in *Hutchinson v. Shepperton* (13 Q. B. 955); and is recognized to a certain extent in *Hagger v. Baker* (14 M. & W. 9).

Where two arbitrators were authorized to name a third, and each proposed a third, and then agreed to throw cross and pile as to whose man should stand, the Master of the Rolls set aside the umpirage, saying, "An election or choice is an act that depends on the will or understanding; but the arbitrators followed neither in this case."—*Harris v. Mitchell* (2 Ver. 485). In some of the old cases it is said, from excessive damages an inference of partiality may be raised.—*Brown v. Brown* (2 Ch. Ca. 140, S. C. 1 Ver. 157; 3 Ch. Rep. 42).

I think, under the authorities, that the learned Judge could not exclude the evidence shewing the merits, and on the ground of the reception of that evidence there could not properly be a new trial. I am not prepared to say that all the evidence received was strictly admissible, but I entertain a strong opinion that the defendants could not be limited to the evidence given before the arbitrators, and so far as that objection was taken a new trial ought not to be granted on it. I think, however, that if exception had

been taken to the charge of the learned Judge, in telling the jury that they should consider if on the whole of the evidence the sum awarded was excessively and fraudulently exorbitant, they should find for the defendants, then I think the verdict ought to be set aside for misdirection as to that ground. I do not understand the objection was so taken, or that the learned Judge was asked to charge the jury on this point in any particular way.

The evidence of the course said to have been pursued by the attorney of the plaintiff and by his arbitrator in relation to the appointment of the third arbitrator, and the selection of such arbitrator by the County Judge, no doubt was commented on to the jury, and may have had some effect on their minds as to one of the arbitrators. The notice of the Railway Company naming an arbitrator was sent to the plaintiff about the 9th of April. The formal appointment was not sent until the 18th of April, and on the 25th of that month Mr. P. A. McDougall was named as the arbitrator by the plaintiff; yet Mr. Prince says in his evidence that his impression is he was spoken to at the Assizes by Judge Cooper about the matter. This must have been early in April. The attorney of the plaintiff on the 7th of May (which was Saturday), appears to have drawn up a notice to inform the Railway Company that an application would be made to the County Judge on Friday then next, at noon, to appoint the third arbitrator; but McDougall's letter conveying his final answer to the other arbitrator as to selecting the third is dated on the 9th of May. The notice, however, was only served on the Company on Wednesday the 11th of May, and the appointment took place on Friday, the 13th of May, at noon, in the presence of the plaintiff, his attorney, and the plaintiff's arbitrator, the County Judge declining to await the arrival of Mr. Wood, the Solicitor of the Company, who was said to be on his way to attend to the matter before the Judge. It does not appear that the Solicitor of the Railway Company was aware that early in April Judge Cooper had inquired of Mr. Prince if he could act as the

third arbitrator, and this even before it was known if the two arbitrators themselves could agree on a third arbitrator or not; nor was he aware that at the Assizes the plaintiff's solicitor had inquired of Mr. Prince if he would act as the third arbitrator if appointed.

The mode in which the case should be submitted to the jury in relation to the amount awarded being "excessively and fraudulently exorbitant," in my view of the law should be somewhat as follows: namely, to look at the evidence given as to the merits, not with a view of deciding upon it that the arbitrators acted fraudulently, but to consider, —looking at the locality where the land is, the quantity of land to which it is said the works of the Company have caused injury, its position, the size and situation of the town and the harbour, and having just the knowledge of the locality which the arbitrators must have had, for they inspected the premises and one of them had long been a resident of the place—and then say, did the arbitrators, in awarding the sum which was given by them to the plaintiff, really exercise their reason and judgment, or did they in fact abdicate their functions as arbitrators, and merely because a certain number of persons had formed extravagant and absurd notions as to the value of certain property, not based upon its then state, but as to what it would have been worth if certain expensive improvements had been made in relation to it then or at some other time, (some of the witnesses saying it would be worth \$60 a foot front, and others \$40)—were they or not in fact misconducting themselves as arbitrators and failing to exercise their own judgment, when they took half of the lowest amount, and fixed \$10,000 as the damages for "injuriously affecting" not quite an acre of land situated as the plaintiff's land was in the town of Goderich.

I think, on proper caution as to the evidence and the way it ought to be considered by the jury, they might be asked to say, as intimated by Mr. Justice Hagarty in his judgment, whether the arbitrators believed the witnesses of the plaintiff who gave testimony before them, *or as rational men ought to have believed them.*

Without saying the analogy is very complete, I can imagine persons stating that an acre of land is worth some very extravagant price because seeds of great value might be sown upon it, and a large amount realized from their sale, and therefore the acre of land must be worth perhaps several hundred dollars. The man who made the statement might suppose he was justified on such a data in making this statement, but any man expected to exercise his reason and judgment would probably be charged with misconduct in relying and acting on such a statement. Or take the extreme case of a common cow of the country being sworn by a witness before an arbitrator to be worth \$100, because he had seen that sum offered for her, when there was in reality not the least probability of any such offer being carried out by an actual purchase. The arbitrator who would say on such evidence that the cow was worth \$100, merely because witnesses, one or more, had so stated, when it was and must be evident to all men that the animal could not be worth half that amount on a very extravagant estimate as to value, would surely be misconducting himself.

I have no doubt the defendants' counsel, in the event of another trial, would find he had a very strong argument to press upon the jury, by simply saying to them, can any man have fairly and reasonably exercised his judgment, and say that the side of the bank of the river Maitland, 115 feet above the level of the stream and sloping down to high-water mark at an angle of 30 degrees, 466 feet long, and running back 80 feet from high water mark, is worth, or was worth in 1864, \$10,000, the whole quantity of land on this side hill so injuriously affected, (apparently wholly useless for any other purpose) not amounting in quantity to an acre.

As to the question of the validity of the reference itself, I do not think that can be raised under the plea of *nul tiel agard*. The last case, of *Whitmore v. Smith* (7 H. & N. 509) and the other cases there referred to, seem to shew that that question cannot be raised under that plea.

Whether the defendants can, in view of the case of *Ricket v. The Metropolitan Railway Co.*, decided so lately in the House of Lords (L. R. 2 H. L. 175), raise the question of plaintiff's right to compensation at all, is a matter for the consideration of their counsel. I do not think we can look at that question in the present state of the pleadings.

Whether the defendants can, by application to the Court below, have the pleadings in this cause amended so as to raise the question of plaintiff's right to recover for the alleged damages in relation to which the arbitration was directed, is a matter to be considered by the defendants' counsel (*a*). As already intimated, we can only dispose of the case on the record as it now stands.

I think the appeal should be dismissed without costs.

SPRAGGE, V. C.—My opinion in few words is, that any evidence that would shew that the arbitrators with the materials before them ought to have come to a different conclusion, and that their coming to the conclusion that they did was inconsistent with good faith, and so evidence of misconduct as set up in the eighth plea, is properly admissible; but I incline to think that opinion evidence as to the value of the land and the damage sustained by the plaintiff was not properly admissible. It may be that these witnesses were right in their opinion, and yet that the arbitrators came to an honest conclusion, and even to a sound conclusion upon the materials before them. I think the admission of such evidence calculated to draw away the minds of the jury from what was the true issue before them.

MORRISON, J.—I agree that the judgment of the Court of Queen's Bench, ordering a new trial, should be affirmed, as I am of opinion, upon a consideration of the case, that it

(*a*) See *Read v. Victoria Station, &c., R. W. Co.*, 1 H. & C. 826; *Beckett v. Midland R. W. Co.*, L. R. 1 C. P. 241.

should be sent down to another jury ; but I cannot concur in the ground upon which the Court below rested its decision, that the defendants should not have been allowed to go into evidence of value at the trial which they might have given, but did not give, on the arbitration, and that the learned Judge who tried the cause should have rejected the testimony. In my judgment such evidence was admissible and was properly received under the issue raised by the eighth plea, and that it was a proper direction to the jury that they might consider such testimony upon that issue, notwithstanding that such evidence was not produced before the arbitrators,

In arriving at this conclusion, I do not consider it necessary to examine into the peculiar facts and circumstances of the case before us, for in my judgment the question is one depending on the general principle, whether upon a plea framed as the eighth plea is we can exclude from the jury evidence as to the amount of damages sustained by the plaintiff ; in other words, any evidence which goes to shew that the sum awarded as compensation is excessive and fraudulently exorbitant.

I cannot say the question is one free from difficulty, as many reasons can be suggested against the reception of evidence in support of the plea, as charging fraud in the arbitrators, which was not heard or produced or tendered to them on the arbitration, and evidence which if produced might in all probability have materially affected their decision, and I feel there is much force in the suggestion that by allowing such testimony arbitrators may be placed at a great disadvantage, and liable to be subjected to most unjust and grievous imputations ; yet, on the other hand, the case being one for a jury, and the question to be tried one of fact, the conclusion of fraud must be found one way or the other. I cannot satisfy myself that in a case where it is alleged that arbitrators have awarded an exorbitant amount, so large that it can hardly be accounted for in the absence of mistake, except upon the suggestion that it was not the result of an honest conviction,

but a deliberate act on the part of the arbitrators to give such an amount, justifying themselves upon the pretence or ground that a witness gave it as his opinion that the amount awarded was fair and reasonable.—I say I cannot satisfy myself that upon the issue raised here, it is not competent to shew by other testimony the true or fair value or estimate, as part of the *res gestæ*. The circumstance of a grossly exorbitant amount being awarded would in my opinion contribute very powerfully, when combined with others of a suspicious nature, to justify a jury in finding, as stated in this plea, the sum awarded to be fraudulently exorbitant.

If the arbitrators in the present case, without hearing any testimony as to value, but merely upon a view of the premises, came to the determination they did, it could hardly be contended that evidence as to value upon the trial was not receivable to shew that the award was excessive and exorbitant. I cannot see upon principle that when they both examine witnesses and view the premises, that a different rule should apply.

MOWAT, V. C.—I concur generally in the opinion expressed in the judgment of the Court below as to the kind of evidence which alone was admissible on the trial of the issue raised by the eighth plea. I think evidence of merits cannot be given, except so far as it tends to shew fraud in the arbitrators, that being the substance of the plea.

DRAPER, C. J., retained the opinion expressed by him in the Court below, concurring in the judgment appealed from.

ADAM WILSON, and JOHN WILSON, JJ., concurred in the judgment delivered by the learned Chief Justice of the Common Pleas.

Appeal dismissed, without costs.

EASTER TERM, 31 VICTORIA, 1868.

(May 18th to June 6th.)

Present :

THE HON. JOHN HAWKINS HAGARTY, J.

“ “ JOSEPH CURRAN MORRISON, J. (a)

BOBIER, ADMINISTRATOR OF HENRY BOBIER, v. CLAY.

27-28 Vic. ch. 18, sec. 40—*Death by “accident”—Meaning of—Damages.*

The Statute 27-28 Vic. ch. 18, sec. 40, makes a tavern-keeper liable in case any person, while in a state of intoxication from excessive drinking in his tavern, has come to his death, “by suicide or drowning, or perishing from cold, or other accident caused by such intoxication.”

The deceased in this case being intoxicated fell off a bench in the bar-room, and was placed upon the floor in a small room adjoining, with nothing under his head. While there he died from apoplexy, or congestion of the brain, brought on, as the plaintiff alleged, by placing him in an improper position while intoxicated.

Held, not a case of death by “accident” within the Statute, but of death from natural causes induced by intoxication.

Whether under this Act proof of some pecuniary damage must be given, or whether, without it, the damages are fixed by the Act at not less than \$100, was a question raised, but not decided.

DECLARATION under the Statute 27-28 Vic. ch. 18, sec. 40, against the defendant as an inn-keeper, alleging that the intestate drank to excess in defendant’s tavern, and while in a state of intoxication from such drinking came to his death by a certain accident caused by such intoxication, to wit, by having been wrongfully and negligently, while so intoxicated, placed by defendant on his back, with his head down, on the floor of a small close

(a) The Chief Justice was absent during this term on leave.

room, and thereby causing a flow of blood to the head, resulting in congestion of the brain and other bodily disorders caused by such intoxication, whereof he then died.

The second count alleged that he came to his death by a certain accident caused by such intoxication, resulting from being placed wrongfully and negligently by defendant on his back, with his head down, on the floor of a small close room, and allowed to remain on the floor in such a position for a long time, till he died from suffocation.

The third count alleged that while in a state of intoxication, &c., he came to his death by a certain accident caused by such intoxication, &c.

Pleas.—Not guilty, and traversing the drinking to excess in defendant's tavern.

The case was tried at St. Thomas, before Richards, C. J. The evidence shewed that deceased had come about noon from one tavern to that kept by defendant. He was not then much under the influence of liquor. He drank at defendant's, not certain how much, and stayed some hours. About two or three he was sitting on a bench in the bar-room, either asleep or drunk; he threw up there, and slid off the bench. Defendant took him, as witnesses said, apparently kindly and gently, into a small room off the bar, called the wash-room, and laid him down partly on his left side, with nothing under him. Defendant said he would get sober after a while. Some hours later he was found there dead.

Dr. Rutherford saw him about an hour after death; some liquor ran from his mouth. He said it was a bad position; if he wanted to vomit it might produce suffocation. There was a *post mortem* examination, on which the brain was found congested, causing death, preventing return of the venous blood to the heart. The symptoms resembled apoplexy caused by congestion of the brain. He said that drinking to excess might produce apoplexy; the position he was in, and in a small close room, would tend to produce it in a drunken man.

Dr. Carscadden, the coroner, agreed that congestion was the cause of death, intoxication the exciting cause. He

said the lungs being congested would be evidence of suffocation ; could not say he did not die from apoplexy ; death might be from suffocation ; a quid of tobacco in the wind-pipe might do it.

There was no evidence of anything in the wind-pipe, and it was proved deceased did not chew tobacco.

At the close of the plaintiff's case it was objected that there was no excess of drinking proved at defendant's tavern, no damage shewn to the plaintiff, and no evidence of death from any of the causes mentioned in the Statute. Leave was reserved on these grounds to move for a nonsuit.

The jury were told to find for the plaintiff if the death was the result of an accident, the liquor drank to excess at defendant's house having caused intoxication, which caused such accident ; and that the least verdict must be \$100. They found for the plaintiff \$100.

W. P. R. Street, obtained a rule *nisi* to enter a nonsuit on the leave reserved, or for a new trial for misdirection, and on the law and evidence.

Harrison, Q. C., shewed cause.

Robinson, Q. C., supported the rule.

The authorities cited are referred to in the judgment.

HAGARTY, J., delivered the judgment of the Court.

The 40th section of the Act, 27-28 Vic. ch. 18, says, "Whenever in any inn, tavern," &c., "any person has drunk to excess of intoxicating liquor of any kind, therein furnished to him, and while in a state of intoxication from such drinking has come to his death by suicide, or drowning, or perishing from cold or other accident caused by such intoxication, the keeper of such inn," &c., "shall be liable to an action as for personal wrong, if brought within three months thereafter, but not otherwise, by the legal representatives of the deceased person ; * * and by such action or actions may recover such sum not less than \$100, nor more than \$1000, in the aggregate of any such actions as may therein be assessed by the Court or jury as damages."

The death in this case did not result from suicide, drowning, or perishing from cold. We have therefore to enquire whether it arose from any "*other accident caused by intoxication.*"

The doubt at once suggested is whether it was in any sense an accident, or an accidental death, and not merely a death from natural causes induced by constant and excessive drinking.

The action is not given in a case of death arising from the want of judicious or skilful treatment, or for not attending to a person in a state in which attention may be requisite; it is only for an accident caused by intoxication.

In *Sinclair v. The Maritime Passengers Assurance Co.* (7 Jur. N. S. 367, 4 L. T. Rep. N. S. 15), the insurance was against "loss of life and personal injury arising from accident at sea." Deceased was a sailor; and in China, while attending to his duties in the ship, was struck down by sun-stroke and died on the same day.

The Court held that the insurers were not liable. Cockburn, C. J., says, "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to draw with perfect accuracy a boundary-line between injury or death from accident, and injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume, that in the term 'accident' as so used, some violence, casualty, or vis major is necessarily involved. We cannot think disease produced by the action of a known natural cause can be considered as accidental. * * * In the present instance, the disease called sun-stroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays."

In the argument for the plaintiff, the counsel says: "I admit that the word accident does not cover disease," to which Hill, J., remarks: "Then death by apoplexy is not within it, though there is suddenness in that death. Is

not sun-stroke caused by the heat of the sun being so intense as to bring on apoplexy?" Cockburn, C. J.: "It is known that extreme heat produces various forms of disease. If a man voluntarily expose himself to it, can it be called death by accident?"

If in the case before us, instead of exposure to excessive sun-heat be substituted excessive drinking producing apoplexy or congestion of the brain or of the lungs, could we hold that death so caused arose from "accident" caused by intoxication?

Trew v. The Railway Passengers' Assurance Company (5 H. & N. 211), was a case where the policy insured against any injury caused by accident or violence, and if death ensued therefrom, &c.; and deceased, who was in bad health, was last seen going towards the shore at Brighton, saying he was going to bathe. His clothes were found by the beach, but he was not seen by any one again alive. A naked body, washed ashore some weeks after, was partly identified as his. The Court of Exchequer upheld a nonsuit, and held that the insurers were not liable: that the evidence was that he died whilst bathing.

In 6 H. & N. 839, this decision was reversed in error, and the Court held there was evidence to go to the jury that he came to his death by drowning, and that drowning was within the policy. Cockburn, C. J., says: "If they found that he died in the water, they might reasonably presume that he died from drowning. It is true that death occurs in the water in some instances from natural causes, as apoplexy or cramp in the heart, but such cases are rare, and bear a small proportion to the number of deaths which take place from the action of the water. We think it ought to be submitted to the jury to say whether the deceased died from the action of the water or natural causes."

It is plain from this case, that if the proof were that he died from an apoplectic seizure in the water, the company would not have been liable.

Had our Statute declared that if any person shall die

from excessive drinking, the person furnishing the liquor so drank shall be responsible in this action, the case would be wholly different. We must be careful not to extend the words used, creating as they do certain new liabilities, beyond their natural sense.

If the deceased, having previously been drinking to excess, took in this tavern a tumbler of brandy, and drank it off at a draught, and thereby produced an immediate apoplectic seizure or asphyxia, and fell back insensible, and died at once or in a few hours, could we hold that to be death from accident caused by intoxication? We think not—that it would be death from natural causes produced by the intoxicating liquor, just as sun-stroke might strike him down, as in the case cited.

Then if no accident had occurred to cause death, we think no absence or presence of skilful or judicious treatment can affect the case.

We also refer to *Fitton v. Accidental Death Assurance Company* (17 C. B. N. S. 122.)

In this view of the law, it is useless to discuss the other important question raised.

The rule must be absolute to enter a nonsuit.

Rule absolute (a).

(a) See *Fenwick v. Schmalz*, L. R. 1 C. P. 313.

MAYBEE V. TURLEY.

Stakeholder—Indemnity—Misrepresentation—Evidence—Costs of suit.

Action by a stakeholder, alleging that he had paid over the wager to the defendant, one of the parties, on his agreeing to indemnify him: that R., the other party to the wager, sued and recovered judgment against the plaintiff, but that defendant did not indemnify. Defendant pleaded that the plaintiff falsely represented to him that R. had not demanded the wager from him, and that on the faith of such statement he promised to indemnify.

The plaintiff produced an exemplification of the judgment recovered against him by R., the pleadings and issues in which shewed that the jury must have found a demand by R. This, it was contended, was evidence of such demand in this action: but *Held*, that at all events it would not prove defendant's plea, which was not supported by the other evidence.

Held, also, that the costs of the suit brought by R. could be recovered on the evidence.

THE DECLARATION set out a wager between one Rosenbrugh and defendant as to whether a certain watch was gold or not, and \$100 and two watches, wagered respectively, were deposited by them in the plaintiff's hands to abide the event of the wager, and to be by the plaintiff delivered to the successful party: that Rosenbrugh won the wager, and the plaintiff, believing that defendant had won, and having been notified by Rosenbrugh not to deliver the watches to defendant, but to him, and being in doubt, &c., defendant, in consideration of his delivering the watches to him, agreed and promised to indemnify the plaintiff from all damages and expenses which the plaintiff might incur by reason thereof: that afterwards Rosenbrugh sued and recovered judgment against the plaintiff for the value of the watches,—setting out the amount and costs on each side. *Breach*, that defendant did not indemnify.

Plea.—That after making the wager and deposit, &c., the plaintiff decided that defendant had won the wager, and defendant demanded the watches from the plaintiff, and the plaintiff then falsely and deceitfully stated to defendant that Rosenbrugh had not demanded the watches from the plaintiff, relying on which defendant promised to indemnify:—that such statement was untrue, and defendant

was deceived thereby, and it was in consequence of Rosenbrugh having demanded the same before the delivery to defendant that the plaintiff was damnified.

Issue.

The trial took place before Adam Wilson, J., at Belleville.

One Taylor proved that the watches were in the plaintiff's hands, and defendant wanted him to give them to him. The plaintiff appealed to the witness, who advised him not to give them, and said Rosenbrugh would sue him. Defendant then agreed to indemnify and save him harmless therefor. Witness told defendant it would be mean to take them, it was a catch bet; he said he did not intend to keep them. The witness thought the plaintiff said he thought defendant had won the bet before defendant asked for the watches; plaintiff was to decide. Twelve or fifteen months after this the witness told defendant that he, defendant, had asked plaintiff before promising to indemnify; that Rosenbrugh had not demanded the watches, and witness believed this to be true. He thought the watches were given up before they talked of Rosenbrugh having demanded them; he heard no conditions about indemnifying; it was not said that if Rosenbrugh had not demanded them defendant would indemnify. The plaintiff's property was under seizure by the Sheriff.

An exemplification of judgment in the suit of Rosenbrugh against the plaintiff was then put in. The first count set out the wager, and that before its decision Rosenbrugh repudiated it, and forbade the plaintiff to deliver the watches, but he did so. The second count set out the wager, and that R. won it, but that the plaintiff, the stakeholder, refused to give them to the plaintiff. Third count, trover. The first plea denied the bet; the second denied the deposit; the third was, that the stakeholder delivered them to Turley, as having won the wager before Rosenbrugh repudiated or demanded. There were the same pleas to the second count, with not guilty to the third count. The issues were found for the plaintiff.

A written paper was also proved, signed by the

plaintiff, to the effect that Rosenbrugh had not demanded the watches from him before defendant had agreed to indemnify.

After the counsel on both sides had addressed the jury, the learned Judge said he did not think the plea was proved in that part that the plaintiff's statement was untrue, and that Rosenbrugh had made a demand.

For defendant, it was objected that the judgment in the former suit, produced as it was by the plaintiff, was some evidence to go to the jury of a prior demand by Rosenbrugh. The learned Judge held that it was not.

There was a verdict for the plaintiff for \$322.22, including costs of defence in the suit brought by Rosenbrugh, with leave to defendant to move to enter a verdict for him, or a nonsuit, or to reduce the verdict.

Bell, Q.C. (of Belleville), obtained a rule on these points, and on the leave reserved, and on affidavit of the absence of a witness.

The affidavit stated that a witness named Falkener was subpoenaed, but did not attend, and was expected to have proved that the watches had been demanded by Rosenbrugh from the plaintiff before the guarantee sued on was given.

Jellett, shewed cause.

Bell, Q. C., supported the rule, citing *Pritchard v. Hitchcock*, 6 M. & G. 151; *Tay. Ev.*, 4th ed., § 1507.

HAGARTY, J., delivered the judgment of the Court.

We think the view of the evidence taken by the learned Judge at the trial was right, and that there was no evidence to support the plea. The defendant insisted that the judgment proved that Rosenbrugh had demanded the watches, and he relies on Falkener proving the same fact if produced.

But assuming that fact was proved, the plea is not thereby proved. The plea is that the promise to indemnify was obtained and given on the faith of a deceitful and false

statement by the plaintiff, that Rosenbruch had not demanded the watches. Unless Taylor's evidence proves that defendant's guarantee was so obtained, we cannot see how any amount of proof, be it ever so clear, that such a demand was made, can help the defendant. His evidence bears no such construction. He said defendant repeatedly offered to indemnify before the plaintiff agreed, and he thinks the watches were given up before they talked of Rosenbruch having demanded them, and that he heard no conditions qualifying the indemnity.

We should not interfere with this verdict in such a case except on the clearest grounds. Defendant, when he got the watches on this indemnity, said, on being remonstrated with, that he did not intend to keep them, that he would only make Rosenbruch sweat a little, and would then give them back and make him treat.

In the view we take of the evidence, we need not discuss the effect of the judgment produced as evidence.

As to the costs of defence in the County Court suit, we think on this evidence that they are properly recoverable, and refer to *Stuart v. Mathieson* (23 U. C. R. 135); *Stubbs v. Martindale* (7 C. P. 53); *Spence v. Hector* (24 U. C. R. 277).

Rule discharged.

HENRICKS V. HENRICKS, ADMINISTRATOR.

Action by son against father for wages—Proof of hiring.

In an action by a son against his father for wages, the only evidence tending to establish the relation of employer and employed, beyond the fact of the plaintiff having worked, was that of a witness who swore that six or seven years ago the father had asked him what wages he was getting, and said the plaintiff wanted \$12.50, and that he would give him \$12. *Held*, sufficient to go to the jury.

ACTION for work and labour. At the trial at Toronto, before *Gwynne*, Q. C., the plaintiff was proved to have

worked for or with his father, the testator, for eight or nine years, up to the death of the latter, who was a farmer. The only evidence tending to establish the relation of employer and employed between them was that of one Lackie, who swore that six or seven years ago the testator asked him what wages he was getting; witness did not reply; the testator then said the plaintiff wanted \$12.50, and that he would give him \$12. Beyond the fact of working, this was the only evidence, and the learned Queen's Counsel directed a nonsuit.

McMichael obtained a rule *nisi* to set aside the nonsuit, to which *John Duggan*, Q. C., shewed cause.

HAGARTY, J., delivered the judgment of the Court.

In *Redmond v. Redmond* last term (*ante*, page 220), we expressed our views at length on this kind of action. We are asked now to carry the doctrine there laid down a step farther. We think we ought not to do so, and that we must hold that the case ought to have been left to the jury.

We express no opinion as to the weight of the evidence, or the view the jury ought to take upon it; but we feel that, as at one time there was evidence from which the relation of master and servant might have been implied, the case should not have been withdrawn from the jury,

We fully agree with all that has been said about the extreme care with which both Courts and juries should scrutinize all claims like that before us.

Rule absolute, without costs.

IN RE TOTTEN, AN ATTORNEY.

Costs—Taxation.

In referring an attorney's bill to taxation, there is no authority here, without his consent, to reserve the right to dispute the retainer. It exists in England under 6 & 7 Vic. ch. 73, which differs in this respect from our Consol. Stat. U. C. ch. 35, sec. 44.

DURING last Hilary Term *Harrison, Q. C.*, obtained a rule calling on William H. Taylor to shew cause why an order of Mr. Justice John Wilson, or so much of it as reserved to Taylor the right to dispute the retainer of the attorney Totten, regarding certain bills of costs, should not be rescinded, &c., and why, if the reservation be allowed to stand, the said Taylor should not be directed to pay the costs of the taxation, whatever may be the event of the questions reserved, on the ground that if a client chooses to have an attorney's bill taxed, reserving to himself a right to dispute liability to the whole or part thereof, either in respect of no retainer or misconduct, he is liable for the costs of the taxation, notwithstanding the reservation, whatever may be the event of the questions so reserved.

The rule was drawn up on reading the copy of the Judge's order, and the affidavits, &c., filed in Chambers and on this application.

It appeared from the affidavits filed, that Taylor (the client) within a month after the bills of costs were served on him, applied to have them taxed, and except as to a small amount he denied by his affidavit the retainer, and claimed leave to dispute the retainer on taxation. The reservation was opposed in Chambers, unless upon condition that Taylor should pay the costs of the reference in any event. The learned Judge, however, made the order that the costs of the taxation be paid according to the event, pursuant to the Statute, and restraining the bringing any suit, &c., and he also reserved the right to Taylor to dispute the retainer of Totten except as to the bills or items undisputed.

During this term *Boyd* shewed cause, citing *In re Payne*, 5 C. B. 407; *Ex parte Woollett*, 12 M. & W. 504, 1 D. & L. 593.

Harrison, Q. C., supported his rule, citing Ch. Arch. Prac. 12th Ed. 127; *In re Shaw*, 20 L. J. Q. B. 280, 20 L. M. & P. 214.

The Statutes cited are referred to in the judgment.

MORRISON, J., delivered the judgment of the Court.

On the argument Mr. Harrison, assuming that the learned Judge had jurisdiction, relied on the case of *In re Shaw* (2 L. M. & P. 214), where Erle, J., said, "I am further of opinion that if a client chooses to have an attorney's bill taxed, reserving to himself a right to dispute liability to the whole or part thereof, either in respect of no retainer or misconduct, he is liable for the costs of such taxation notwithstanding such reservation, and whatever may be the event of the questions so reserved." In that case the order of reference imposed no liability to pay the costs of taxation, according to the direction of the Statute.

A rule thus laid down by a very able Judge, and unquestioned for seventeen years, and which is cited and referred to as authority by all the text writers in the latest editions of the books on practice, we cannot but follow, and hold to be the practice in like cases.

But it was contended on the part of the attorney that our Statute, ch. 35, Consol. Stat. U. C., gave the learned Judge in this case no jurisdiction to reserve the question of retainer, the 28th section of that Act, under which the application in Chambers was made, only authorizing the taxation and the restraining the bringing of any suit pending the reference.

Under the Act 2 Geo. II., ch. 23, before a reference could be had the client had to undertake to pay whatever sum might be found on taxation due. Under that Statute the question of retainer could not arise. It therefore becomes important to ascertain under what authority the practice has arisen in England to insert in orders of reference the

reservation of questioning the liability, and to see whether a like authority exists here.

The English Act 6 & 7 Vic. ch. 73, and our Consolidated Act, ch. 35, are in effect the same, except that section 44 of the latter omits the words or clause at the end of the 43rd section (the corresponding one) in the Imperial Act, which enacts, that "in case such reference shall be made in any Court of Common Law, it shall be lawful for such Court, or any Judge thereof, to order judgment to be entered up for such amount, with costs, *unless the retainer shall be disputed*, or to make such other order thereon as such Court or Judge shall deem proper."

The leading case bearing on the question, and upon which Mr. Boyd relied, is *In re Pyne* (5 C. B. 407), and it appears from a consideration of that case, that the authority for introducing into the orders of reference the right to dispute the retainer is derived from the clause referred to at the end of the 43rd section of the English Act. In that case the application was one made within the month, and in other respects like the one now under discussion. Wilde, C. J., in giving judgment says: "*It also appears by the Statute*, there are certain cases in which, though the bill is referred for taxation, it is yet open to the party to question the retainer; for by the latter part of the 43rd section it is enacted that," &c., setting out the clause above quoted; and the judgment proceeds, "What it may be necessary for the party to do to entitle himself to the benefit of that provision, may be a little uncertain. Possibly if he applies for an order to tax, without giving any intimation of his intention to dispute the retainer, it may be considered too late to consider it afterwards. Upon the present occasion, however, the order is precisely in the form contemplated by the Statute, with the single exception of the words 'And I further order that the said Lord Viscount Wellesley shall, notwithstanding the order and the taxation, be at liberty to question the retainer of the said Pyne.' It may be doubtful whether the party was entitled as of right to have that provision incorporated in the order. Possibly its insertion might be

a favor to him. But, assuming that he was not strictly entitled as of right to have those words inserted—supposing it to be a matter of discretion for the Judge—has that discretion been properly exercised?” And further on in the judgment, he says: “*The Statute providing that the client may dispute the retainer*, what is there to relieve the attorney from being restrained from bringing an action at the outset?” In that case, as in this, both conditions were imposed, and one point was, whether the insertion of the reservation was a proper exercise of discretion.

We think it is clear from that case, that the authority to insert such a reservation in the order of reference in England is derived from the latter part of the 43rd section of the Imperial Act, and as that clause is wanting in our Statute, and in the absence of any other authority, we are of opinion that the learned Judge had no jurisdiction, without the consent of the attorney, Totten, to make the reservation complained of. The question of retainer or liability is one of fact, and the attorney has a right to have it determined by a jury. If both parties consent that the liability should be enquired into by the Master, on the authority of *In re Lowless & Son* (6 C. B. 123), the parties, we take it, would be bound by the decision of the taxing officer, and in that case the rule laid down by Erle, J., in *In re Shaw*, would follow. After action brought, the Courts have jurisdiction over the cause, and have authority to and do refer bills for taxation for the purpose of ascertaining the amount, without prejudice to the defendant disputing the retainer, or calling upon him to abandon any defence he may have at *Nisi Prius Williams v. Griffith* (6 M. & W. 32); and in such case, as held by Alderson, B., in *Thomas v. Mayor, &c., of Swansea* (11 M. & W. 83), as the Master's taxation of the bill is only in the place of the jury to ascertain the amount, that the costs of taxation on principle would be costs in the cause, whatever way the verdict might ultimately be.

We are therefore of opinion that the rule should be made absolute to set aside the order, or, if Taylor assent, then to rescind so much of it as reserves the right to dispute the retainer.

The effect of our decision will not place a party who disputes or denies the retainer of the attorney to any great disadvantage, for in such a case, should an action be brought, the defendant may then have the bills taxed as a proceeding in the cause, the costs of which will follow the result of the trial.

Rule absolute, without costs.

CAIN V. THE LANCASHIRE INSURANCE COMPANY.

Insurance—Condition for terminating risk—Construction—Evidence.

A condition endorsed on an insurance policy provided that, if for any cause the Company should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the Company should refund a ratable proportion of the premium.

Held, not essential that the notice should precede the termination of the insurance, but that they might be contemporaneous, and that the Company could terminate the risk by giving notice that they did so, and refunding the unearned premium.

Held, also, that in this case, on the facts set out below, there was evidence for the jury to shew a termination of the risk under the condition.

THIS was an action on a fire policy, the declaration being in the usual form.

Plea—That among the conditions endorsed on the policy was a condition in the words following: that is to say: "If during this insurance the risk be increased by the erection of buildings, or by the use or occupation of neighbouring premises or otherwise, or if for any other cause the Company shall so elect, it shall be optional with the Company to terminate the insurance after notice given to the insured or his representatives of their intention to do so, in which case the Company shall refund a ratable proportion of the premium." And that during the said insurance, and before the happening of the said fire, the defendants were informed that the said hotel had been set on fire, and that the defendants had reason to suspect that the said insured buildings would be unlawfully and maliciously set

on fire, whereupon the defendants elected to terminate the insurance, and before the happening of the loss gave notice to the plaintiff of their intention to do so, and did thereby terminate the said insurance. And the defendants were always, at and after the giving of the said notice, ready and willing to refund to the plaintiff a ratable proportion of the said premium, whereof the plaintiff had notice; and the defendants after the giving of the said notice, and the termination of the insurance, and before the happening of the loss, tendered and offered to refund to the plaintiff the ratable proportion of the premium, but the plaintiff refused to accept the same.

Issue was taken on this plea, and the case was tried at Sarnia, before Richards, C. J.

It appeared that the policy was effected on the 27th of January, 1867, for one year: that one Turnbull, the defendants' local agent at Sarnia, being in Toronto, and having received a telegram from one Carman, who acted for Turnbull in his absence, stating that he had been informed that an attempt had been made to burn the insured premises, he, Turnbull, communicated the matter to the defendants' general agent in Canada, at Toronto, who then instructed Turnbull to terminate the insurance under the condition endorsed on the policy; all this took place about the 1st of June, 1867: that Turnbull immediately telegraphed to Carman to do so: that Carman then gave to one McGarvey the amount of the ratable proportion of the premium, \$33.56, and instructed him verbally, and gave him the following letter:

SARNIA, 1st June, 1867.

W. H. MCGARVEY, Esq., Petrolia.

Dear Sir.—I inclose herewith the sum of \$33.56, and shall be obliged if you will kindly pay to John Cain of your town, and retire a policy of insurance which he holds against the Lancashire Insurance Company for \$2000. The annual premium is \$50, due 21st January, 1868, the amount unearned is \$33.56.

Yours,

GEO. A. CARMAN.

On the same evening McGarvey went to the plaintiff's hotel, the premises insured, and taking the plaintiff into the sitting room he told him that he had some money for him. He shewed and read to the plaintiff Carman's letter to him, and told the plaintiff by that authority his policy would be cancelled, and he then counted out the money to him, and asked the plaintiff for his policy. The plaintiff asked who Carman was, and he was told he was acting for Turnbull. Plaintiff then said he did not think they, the defendants, had any right to retire the policy until the year was up. McGarvey told him it would make no difference whether he took the money or not, the policy was at an end, and that if the policy was cancelled he, plaintiff, might as well have the money as have the Company keep it, when the plaintiff said if they would return the whole of the premium he would give them up the policy. The premises were burned on the 9th of June.

Upon this evidence the plaintiff's counsel, at the close of the case, contended that the defence was not made out; that it was a question for the jury whether reasonable notice was given to terminate the policy; that there was no evidence of intention to terminate, no reasonable notice, and no act after the notice terminating the insurance.

The learned Chief Justice was of opinion that the notice ought to precede the terminating of the risk, that they could not be cotemporaneous acts; that the facts did not shew a prior notice; and that the plaintiff was entitled to recover, no act terminating the policy being shewn.

The defendants' counsel objected to the ruling and charge, and the plaintiff's counsel refusing to consent to the point being reserved, a verdict was directed for the plaintiff.

C. S. Patterson obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, the defendants' plea being proved, and for misdirection.

Anderson shewed cause, citing *Doe Lyster v. Goldwin*,

2 Q. B. 143. *Story* on Agency, sec. 246. *Roe v. Davis*, 7 East, 363; and *Patterson* supported his rule.

MORRISON, J.—We are of opinion that the rule should should be absolute for a new trial, as in our judgment there was evidence to be submitted to the jury in support of the defendants' plea, and that it should have been left to them to say whether the plea was proved.

We cannot fully concur in the view taken by the learned Chief Justice on the trial, that the notice and termination of the insurance could not be cotemporaneous—in other words, that it was essential that some interval of time should elapse between the notice and termination of the risk.

The condition in question is one made for the protection and benefit of the insurers, and although its language is not happily expressed, we think the proper construction to be given to it is, that the defendants had a right to terminate the risk at any moment by simply notifying the plaintiff they did so, and refunding to him their unearned portion of the premium.

It was, however, submitted by the plaintiff's counsel, that the notice contemplated by the condition was a notice giving to the plaintiff a reasonable time to afford him an opportunity of effecting a new insurance previous to the termination of the defendants' policy.

We cannot accede to that interpretation, for were we to do so we would be adding a term to the condition somewhat inconsistent with its object and intention, viz., the right to put an end to the risk at any time. The notice contemplated by the condition is a mere signification of the will and exercise of the option reserved to the defendants, and such notice, together with the refunding of the rateable proportion of the premium, terminates the insurance.

It was also contended that the notice relied on by the defendants was not a good notice, not having been given by an authorized agent of the defendants, and not such a notice that the plaintiff could have acted upon with safety. This objection does not appear to have been taken or the

question raised at the trial. It is clear that McGarvey, who notified the plaintiff, was no volunteer; the evidence shews that he was acting in pursuance of instructions communicated to him by the defendants' agent, and that the plaintiff dealt with him as a person acting on behalf of the defendants, for he contested with McGarvey the right of the defendants to cancel the policy within the year, and offered to give up to him the policy if the defendants would return the whole premium.

We think there ought to be a new trial without costs.

HAGARTY, J.—There was evidence, I think, which defendants were entitled to have submitted to the jury in proof of the plea. Carman was acting for Turnbull, the local agent. He wrote to McGarvey to give the notice and refund the money. He gave the notice (at least he swore he did), and then tendered back the insurance money. Plaintiff did not dispute his personal authority, but objected that they could not cancel till the year was up, and again, that if they refunded the whole premium he would give up the policy. All this was ten days or so before the fire. I cannot see why giving notice and tendering back the money should not amount at least to evidence to be submitted to a jury of an exercise of the right to cancel. If, as was suggested, a company attempted to do this in a merely illusory manner, as (for the sake of argument), while a fire was raging five or six houses off from the house insured, this would probably be treated as a mere evasion. The objection that reasonable time should be given to the assured after notice and before complete cancellation, is, as already stated, adding a new term to the condition.

If it could be legally cancelled by first giving notice, then within an hour entering some formal act of cancellation in the company's books, and then forthwith tendering back the money, there would be no substantial difference in the proceeding.

Rule absolute. (a)

(a) On the second trial the jury were in effect directed, upon the same evidence, that the plea was proved, and the plaintiff took a nonsuit.

SHANNON V. DALY ET AL.

Witness—Competency.

In an action by the endorsee of a note, the payee, being called as a witness and examined on his *voir dire*, said he owed the plaintiff \$100, and that as there was no one to prove the case against the defendants but himself, he advised the plaintiff to take this note from him, on which about \$270 was due, so that he could give evidence: that for the balance over \$100 the plaintiff gave him his note, which the witness said at the trial he did not intend to sue upon in the event of the plaintiff failing in this action, although he could not say there was any bargain to that effect.

Held, that the payee was a competent witness.

ACTION on a promissory note, made by the defendants, payable to William Shannon or order, on which about \$270 was due. The payee, the uncle of the plaintiff, was called as a witness and examined on his *voir dire*. He said he owed the plaintiff \$100, and as there was no one to prove the case against the defendants but himself, he advised the plaintiff to take the note from him, so that he could give evidence. He could not say whether he would or would not get the benefit of the proceeds of the action; on recovery the plaintiff was to pay the witness the balance over \$100 which he owed him. The plaintiff gave witness his note for the difference. "If the plaintiff should not recover this note," he said, "I do not sue him on his note." On being asked if there was any bargain that he should not sue, the plaintiff said he could not say there was any bargain not to sue the plaintiff. The witness was admitted by the learned Judge, subject to the defendants' objection, and the plaintiff had a verdict.

Hector Cameron now moved against this ruling.

Cur. Adv. Vult.

HAGARTY, J., delivered the judgment of the Court.

It appears to us that the learned Judge was right in admitting the evidence. Had the payee made an absolute gift to the plaintiff of the note, he would certainly be competent. Had he *bond fide* made the arrangement in

evidence, there would be the same result. The only difficulty is whether there was a bargain or contract not to sue the plaintiff for the balance over the \$100 if he failed to recover in this suit. The witness merely saying that he would not sue him on the note unless he recovered here will not suffice; the question would rather be, has he the right to sue him thereon? He swears that he cannot say there was any bargain not to sue.

There is no doubt, we think, that a release, which might be executed in the witness box, would remove this objection. See on this, *Sage v. Robinson* (3 Ex. 147).

We have examined the cases of *Bonner v. Moderwell* (9 C. P. 504); *Hearne v. Turner* (2 C. B. 535); and *Adams v. Toland* (12 C. P. 119).

The latter case was far stronger against the admissibility than the present, and the remarks of the Chief Justice in dismissing the appeal are much in point here.

Hill v. Kitching (3 C. B. 308), is also in point. *Maule, J.*, says, "The general scope of the Act is to allow the examination of all persons, notwithstanding they may have an interest in the event of the suit. The meaning of the proviso is, that no person who is the formal plaintiff on the record shall be called as a witness, nor any person who, though not the formal plaintiff, is yet substantially so"—instancing the case of the assignee of a bond suing in the assignor's name, the former being incompetent.

In the case before us, the plaintiff is the legal indorsee of the note, and while he continues so an action would not lie in the witness's (the payee's) name. The plaintiff has an interest to \$100, the debt due to him by witness, and has given his note to witness for the difference. Can we hold on this evidence that he cannot be sued on this note? If he can be his interest to the whole amount would be clear.

We think we should not grant a rule on such evidence as is before us. The credibility of the witness was wholly a matter for the jury, and there is now no attempt to impeach it.

We abstain from discussing what the law may be if no

other arrangement had been made between the payee and plaintiff than endorsing the note to enable the latter to recover the \$100 due him by payee.

Rule refused.

SIMPSON ET AL. v. HARTMAN.

Married woman's deed—Certificate of Examination—C. S. U. C. ch. 85. sec. 13—Deed in fee reserving the occupation for life—Construction.

A deed conveying land in fee simple, "reserving, nevertheless, to my" the grantor's "own use, benefit and behoof, the occupation, rents, issues and profits of the said above-granted premises, for and during the term of my natural life." *Held*, a conveyance of the fee-simple, not a mere testamentary paper which the grantor could revoke by a subsequent deed. *Quære*, whether the reservation was void, or whether only the reversion passed subject to the life estate.

The certificate on a married woman's deed, twenty-five years old, signed by two justices, was as follows :

MIDLAND DISTRICT, } "Be it remembered, that on the 8th May, 1843,
To Wit. } R. G., wife of the within-named L. G., who being
 examined by us separate and apart from her said husband, touching
 her consent to surrender and give up to the within-named H. S., his
 heirs and assigns, all her right and title," &c., &c.

Held, sufficient—for, 1. It was immaterial that the certificate was not endorsed on the deed but written in the margin on the face of it. 2. The venue sufficiently shewed where the examination took place; and an admission which was made of the justices' authority must be taken to mean their authority as justices for that district. 3. As the names of the two witnesses to the deed were the same as those of the justices, and the handwriting similar, and the date of the deed and certificate the same, it might be inferred that the execution took place in their presence. 4. The words "surrender and yield up" were equivalent to the statutory phrase "depart with."

The motion being for a non-suit, as there was thus evidence from which a jury might have found the requirements of the Acts complied with, the rule was discharged.

EJECTMENT for the west-half of the east-half of lot 26, in the first concession of Ernestown.

The plaintiffs claimed by deed from Henry Simmons, dated 4th February, 1868.

Defendant denied their title, and claimed under a deed from Margaret Hartman.

The case was tried at Napanee, before Adam Wilson, J.

The plaintiffs put in—1. A deed from Margaret Hartman, whose title was admitted, to Rosina Gaylord, wife of Luther Gaylord, dated 27th February, 1843, registered on the 28th February, 1843, in fee.

2. A deed from Luther Gaylord and Rosina, his wife, dated 8th May, 1843, to Henry Simmons, of this land, in fee, which was admitted. A certificate of examination by two justices was endorsed thereon.

3. A deed from Henry Simmons to the plaintiffs in fee, dated 6th February, 1868.

A nonsuit was moved for, on the ground that the first deed, from Margaret Hartman, was only a testamentary paper, containing a reservation of a life estate; and on various objections, noticed in the judgment, to the magistrates' certificate on Mrs. Gaylord's deed.

Leave to move for a nonsuit on these objections was reserved.

For defendant a deed was proved from Margaret Hartman to defendant of this and other land, dated 12th June, 1850, registered 13th June, 1850, in fee, the consideration expressed being £500.

Also, a mortgage from defendant back to her, with condition for her support. She died two or three years ago. It appeared that she lived on the land to her death, and evidence was given of defendant having supported her for many years.

The learned Judge charged in favour of the plaintiffs, and the jury found for them.

It was objected that as Simmons had notice of the deed to Rosina being voluntary, he stood in no better position.

John Paterson obtained a *rule nisi* to enter a nonsuit pursuant to the leave reserved, to which

Crooks, Q. C., shewed cause, citing *Stayner v. Applegate*, 8 C. P. 451.

Harrison, Q. C., supported the rule, and cited as to the effect of the deed to Rosina Gaylord, *Habergham v. Vincent*,

2 Ves. Junr. 204 ; *Doe dem Cross v. Cross*, 8 Q. B. 714. As to the certificate of examination on the deed from her, he contended that the Consol. Stat. U. C., cap. 85, sec. 13, could not cure the defect, there being no evidence that the requirements of the Acts were in fact complied with : that *Tiffany v. McCumber*, 13 U. C. R. 159 ; *Allison v. Rednor*, 14 U. C. R. 459 ; and *Jackson v. Robertson*, 4 C. P. 272, were distinguishable, some evidence having been given there besides the certificate ; and *Orser v. Vernon*, 14 C. P. 573 ; and *Monk v. Farlinger*, 17 C. P. 41, because there possession was shewn in accordance with the deed.

The magistrates' certificate, and the material part of the deed to Rosina Gaylord, are set out in the judgment.

HAGARTY, J., delivered the judgment of the Court.

The first objection to be disposed of is the effect of this deed to Rosina.

It is a deed poll, in consideration of love and affection for her daughter, the grantee, and of five shillings, by which she gives, grants, bargains, sells, &c., to her heirs and assigns, habendum, to her and her heirs, to their own use for ever,—“ Reserving, nevertheless, to my own use, benefit and behoof, the occupation, rents, issues and profits of the said above granted premises for and during the term of my natural life.”

This it was contended was a mere testamentary paper, and was revoked by the subsequent deed to the defendant.

We have been referred to *Habergham v. Vincent*, 2 Vesey Junr. 204, and to *Jarman on Wills*, vol. i., p. 14, 2nd Ed., and the cases there noticed, where instruments in the apparent form of deeds have been held to be only testamentary. Buller, J., says “An instrument in any form, whether a deed poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will.”

It is a fallacy to urge that when the estate cannot be enjoyed till after the death of the grantor, the instrument must be testamentary. A conveyance of the reversion can

doubtless be made after the determination of a life-estate. We can see nothing in this deed to induce us to regard it as testamentary. The question seems to be what is its effect. Without the reservation it is indisputably a good deed in fee-simple. The learned Judge at the trial considered that the reservation was simply void. Are we to hold it void, or that it is a grant of the reversion, subject to the life-estate, the fee vesting at once in the grantee? There is no estate in terms reserved, merely the occupation, rents and profits.

In Co. Lit. 142 *a*, it is said "A man upon his feoffment or conveyance cannot reserve to him parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that should be repugnant to the grant; *non debet enim esse reservatio de proficuis ipsis, quia ea conceduntur, sed de redditu novo extra proficua.*" See also Viner's Ab. vol. xix. 106. "A man cannot reserve a less estate to himself than he had before. As where a man man seised of an advowson in fee grants it to another, reserving the advowson to himself for term of his life, this is a void reservation; for he had the fee before. And if a man grant his advowson to another, reserving the presentation for term of his life, this is a void reservation; for he reserves the same thing which he has granted. So if a man leases an acre of land for life, reserving the herbage of the same acre, this is a void reservation; for it is parcel of the thing which he granted, and therefore is repugnant and void." Vin. Ab. vol. xix. p. 108; Brooke Ab. Reservation, Pl. 19.

Shep. Touch. vol. i., p. 80, "A reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that which he granted before. * * This doth differ from an exception, which is ever of part of the thing granted, and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before, so that this clause doth always reserve that which was not before, or abridge the tenure of that which was before."

But it is useless to pursue this inquiry further. The question before us is not whether this reservation is good or bad, but whether the deed in which it appears passed an estate in fee simple to the grantee. Our opinion is in the plaintiffs' favour on this point. We cannot hold either that the deed is open to the objection that it is testamentary only, and liable to revocation by the grantor, or that the attempted reservation can prevent its operation.

Mrs. Hartman's death several years ago renders her interest during life a matter of no moment.

The certificate in the deed from Gaylord and wife is most unfortunately worded. It is as follows:—

“MIDLAND DISTRICT,) Be it remembered that on the
To Wit:) eighth day of May, 1843, Rosina
 Gaylord, wife of the within named Luther Gaylord, who
 being examined by us separate and apart from her said
 husband touching her consent to surrender and give up to
 the within named Henry Simmons, his heirs and assigns,
 all her right and title, interest and estate, in, to or out of
 the land and premises within mentioned, did appear to us
 to give her consent thereto,” &c., (as in the usual form.)

(Signed) SIDNEY WARNER, J. P.
 JACOB SHIBLEY, J. P.

It is first objected that this certificate is not endorsed on the back of the deed, but within on the face of the deed, in the margin.

We think this is no valid objection. A very simple process of turning back the margin and pasting or pinning it to the back of the deed would at once meet this hypercritical point.

Next, it does not state where the examination was had. The Statute of 1839, 2 Vic. ch. 6, it is agreed is that in force when the deed was made, and which refers to 1 Wm. IV. ch. 2. Both these acts, in directing what is to be certified, speak of a place to be named in the certificate, and the form of certificate given contains the statement of the place.

The Consol. Stat. U. C. ch. 85, sec. 13, provides, that whenever before the 4th May, 1859, the requirements of

the Acts have been complied with in the execution by any named woman of a deed, &c., such execution shall be deemed and taken to be valid and effectual to pass the estate, &c., although the certificate endorsed on such deed be not in strict conformity with the forms prescribed by the said Acts.

If it had been proven at the trial that in fact the examination took place in the Midland District, or at the Township of Ernestown in that district, the omission of the place would be cured. Had the certificate stated that she appeared at or in the Midland District generally, however vague it might be, we should uphold it. Here no place is mentioned in the body of the certificate, but in the margin there is "Midland District, to wit." If we can import this venue into the body of the certificate, we think the difficulty may be met. The case of *Monk v. Farlinger* (17 C. P. 41), upheld a certificate against this objection, treating the venue in the margin as sufficiently indicating the place of examination.

We find an admission used at the trial, in which it states that the signatures and authority of the Justices who purport to sign the memorandum on this deed are admitted. The authority we take to mean authority as Justices of the Peace for the Midland District.

If two persons admitted to have authority as Justices, sign a certificate with the marginal venue of Midland District, being the district stated in the instrument as the residence of all the parties, we think that by every reasonable intendment they did the act within their jurisdiction, and not outside it. By law such an examination was to be before two Justices of the district where the woman resided. We held in *McNally v. Church* (27 U. C. R. 103), that till the contrary was shewn we should presume the woman resided where her husband is stated in the deed to reside.

On all these, we think, after the lapse of twenty-five years, there would be enough for the jury to find that the examination took place at and in the Midland District.

Then it is said she must execute the deed before the Justices. If she did so as a matter of fact, the formal objection might be cured. In this deed the names of the Magistrates are Sidney Warner and Jacob Shibley; both these names are set as subscribing witnesses to the deed, and there is a similarity in the hand-writing, and the certificate and the deed bear the same date. Had it been left to the jury on this to say if they found the deed was executed in the presence of the Justices—or, in other words, are the witnesses and the Justices the same persons—at this lapse of time we could not say that their finding in the affirmative would be erroneous.

We think the words “surrender and give up to said Henry Simmons, his heirs and assigns” may be upheld as equal to the statutable words “depart with.”

We have endeavoured to follow the example of our Courts in upholding the certificate in this case, when there is every reason on the face of the papers to induce the belief that in fact everything was done correctly, however unfortunate the blunders committed in framing the certificate.

The late case in this Court of *Morgan v. Sabourin* (27 U. C. R. 230), shews the tendency to uphold instead of avoiding for defect of form.

Robinson v. Byers (13 Grant, 388), is in point as to the venue in the margin supplying the omission of place in the body of the certificate.

An objection was taken that a purchaser for value from a volunteer with notice stands in no better position. This we consider too clearly untenable to require further notice.

The motion before us is for nonsuit. As we think there was some evidence from which the jury might have found as facts certain matters not formally stated in the certificate, we follow the precedent of *Morgan v. Sabourin*, and refuse the motion.

Rule discharged.

STEWART V. JARVIS ET AL.

Costs—Revision.

In trespass for entering plaintiff's close and taking his goods, defendant pleaded not guilty, that the goods were not the plaintiff's, and justification under a *fi. fa.* Title to land was not brought in question. *Held*, that the plaintiff on a verdict for \$175 was clearly not entitled to full costs without a certificate.

Where the taxation is not objected to before the Master, the Court is slow to interfere, but *Held*, that the circumstances shewn in this case sufficiently explained the omission.

In Michaelmas Term last, *J. H. Cameron*, Q. C., obtained a rule calling on the defendants to shew cause why an order of Mr. Justice Adam Wilson for the revision of the taxation of costs herein should not be set aside, on the ground that the nature of this action was not one which rendered it necessary to apply for a certificate at the close of the trial, or one in which any but full costs could be properly taxed, and also that no objection was taken to the taxation when before the Master.

The order of the learned Judge was set out in the rule, and it directed that the Master should revise the taxation of the costs, and on such revision allow to the plaintiff County Court costs only, and allow to the defendants so much of their costs as between attorney and client as exceeds the costs of defence in the County Court, and that the defendants' costs be set off against the plaintiff's costs pursuant to the Statute; it further ordered that the judgment entered and writ of execution thereon be amended according to the result of the revision. See *Stewart v. Jarvis*, 2 U. C. L. J. 330, N. S.

It appeared from the affidavits and papers filed that this was an action for trespass for entering the close of the plaintiff and seizing and taking a mare and colt, and selling and converting the proceeds, &c., to which the defendants pleaded not guilty, goods not the plaintiff's, and a special plea, setting out a judgment and *fi. fa.*, and a justification under it for entering on the close and taking the mare, &c., upon which issue was joined: that a verdict

was had for \$175, and that no certificate for superior Court costs was granted; no title to land was brought in question: that notice of taxation was given on the 24th for the 25th, at ten a. m.: that the clerk of the defendants' attorney, intending to obtain a consent from the plaintiff's attorney for an enlargement, called at the office of the attorney of the plaintiff, at half-past nine on the 25th, but found the office closed, and then proceeded to the Master's office before half-past ten, when he found that the taxation was proceeding, the Master not having waited the usual half-hour: that the clerk not knowing the amount of the verdict or state of the cause, and only being there for the purpose of obtaining an enlargement, made no objection, and the costs were taxed on the superior scale. On that same day the defendants obtained a summons for a revision, and subsequently the learned Judge made the order complained of.

Harrison, Q. C., shewed cause, citing *Mills v. Stephens*, 3 M. & W. 460; *Ryalls v. Emerson*, 2 Dowl. 358; *Purnell v. Young*, 6 Dowl. 347; *Levitt v. Rathwell*, 27 L. J. Ex. 8; *Burton v. Burton*, 29 L. J. Ex. 291.

Harman supported the rule, and cited *Wright v. Piggin*, 2 Y. & J. 544; *Pugh v. Roberts*, 6 Dowl. 561; *Hore v. Saxl*, 17 C. B. 602; *Kent v. Great Western R. W. Co.* 3 C. B. 714.

MORRISON, J., delivered the judgment of the Court.

The County Court has jurisdiction in actions of trespass, where the damages do not exceed \$200, and the title to land does not come in question, and in all cases of the competence of that court tried in the superior Courts, if no certificate is granted as mentioned in the 328th section of the C. L. P. Act, the taxation of costs follow as directed in the order now moved against. Upon the pleadings in this cause there is no plea putting in issue the title to the land. The special plea upon which the plaintiff relies to entitle him to full costs is a plea admitting the title, but justifying the entry, &c., under an execution, so that the ques-

tions at the trial would be the seizure, the title to the goods, and the amount of damage.

The verdict being under \$200, it is quite clear the action was one within the competence of the County Court, and as no certificate was granted as provided in the 328th section, the Master ought not to have taxed to the plaintiff superior Court costs.

It was argued by Mr. Harman, that upon the pleadings appearing on the record, the fact that there was a special plea entitled the plaintiff to full costs, and he relied upon the authority of the decisions in the cases of *Purnell v. Young* (6 Dowl. 347) ; *Pugh v. Roberts* (Id. 561), and *Wright v. Piggin* (2 Y. & J. 544). None of these cases are applicable. They were decisions under the 22 & 23 Car. II. ch. 9, and the 43 Eliz. ch. 6, and the rule laid down in those cases cannot govern this one. We have also considered the grounds of the learned Judge's decision when he made his order, and we entirely concur in his judgment.

As to the ground that no objection was made before the Master to the taxation, the general rule is, that if the taxation is not complained of before the Master the Court is slow to interfere, but the circumstances under which this taxation took place, and the prompt application to revise, meets the objection.

We are therefore of opinion that the rule should be discharged with costs.

Rule discharged.

WELLS V. CUMMING.

Crown lands—Proof of purchase—Timber license.

The plaintiff obtained from a County Crown Lands Agent a ticket stating the amount to be paid into the Bank of Montreal as the first instalment on a lot, which he said he would probably buy. Nearly a month afterwards he paid this sum to the Bank, taking their receipt, which stated that it would appear at the credit of the Crown Lands Department, from which he subsequently received a letter acknowledging the receipt of the money on this lot, and saying that his communication would receive attention. The agent said this was not a sale, and that this lot was not in the monthly return of lots sold sent to him from the Department. Defendant held a timber license for this and other lots, but land previously sold was expressly excluded from it.

Held, that the plaintiff was not a purchaser from the Crown, so as to entitle him to recover against defendant, for cutting timber on the lot.

TRESPASS for entering upon Lots 18 and 20, in the 8th concession of Galway, and cutting trees.

Pleas. Not guilty, and denial of title to land or goods.

The trial took place before Adam Wilson, J., at Peterborough.

Some evidence was given of the plaintiff's possession of the land, lot 20, in the 8th concession of Galway, and that he had a shanty on it, and a small piece of chopping not cleared. The plaintiff on the 29th December, 1866, had gone to Graham, the Crown Lands Agent at Bobcaygeon, and procured from him a memorandum to this effect, "John Wells, \$25.40, as first instalment on lot 20, 8th concession, Galway," signed Joseph Graham, Crown Lands Agent.

The agent called this a ticket to the Bank to shew how much was to be paid, and on what lot. He said the lot was sold subject to settlement duties—to take possession in six months, to clear two acres, and build a house 16 by 20, and continue in possession: that last fall he saw the lot, and the conditions were not complied with, and no one was then in possession; that when the plaintiff came he said it was probable he would buy the lot, and he, the agent, gave the ticket to the Bank of the amount to be paid: that he never received any communication thereon from the Crown Lands Department, and made no sale to the plaintiff beyond this; if he

had made a sale the plaintiff should have sent him a duplicate of the Bank receipt and advice note, and he would have forwarded it to the department, and have advised the Crown Timber Agent at the end of the month. The plaintiff, after seeing the agent, went on the 24th January, 1867, to the Bank of Montreal, at Peterborough, and paid the \$25.40, taking their printed receipt for that amount, on account of the Department of Crown Lands, as received from John Wells, which amount, it said, will appear at the credit of the account with this Bank on lot number 20, 8th concession of Galway. The plaintiff afterwards received a letter from the Crown Lands Department, dated Ottawa, 1st February, 1867, by which the Commissioner said he was in receipt of draft for \$25.40, on lot 20, 8th concession of Galway, and (in print) that his communication would receive the attention of this department.

The agent said this letter was not a sale ; that he would not have entered it in his books till he had notice of the sale being carried out. He entered in pencil in his book that money had been paid on 19 and 20, and not seeing notice of the sale being carried out for these lots, scratched the entry out of his book. The plaintiff had planted a small patch of potatoes, but had never lived on the land.

Defendant had a Crown Timber license for this and other lots, covering the time when he took the timber in question. The license at the end provided that it was not to include lots sold previous to the date of issue, provided the conditions of actual settlement, when required, had been duly complied with. The agent proved he had never received any notice of this lot being sold, and that every month he received notice from the department of the sale of lands within his jurisdiction ; if informed it had been sold that he did not include it in a license, and if he had been notified that this lot was sold he would not have included it in the license.

It was objected for defendant that the plaintiff had no title to maintain the action. The learned Judge so ruled, directing a verdict for the defendant, with leave to the

plaintiff to move to enter it for him for the value found by the jury.

Hector Cameron obtained a rule *nisi* accordingly.

Bell, Q. C., of Belleville, shewed cause.

Henderson v. McLean, 8 C. P. 42; *Walker v. Rogers*, 12 C. P. 327; *Harper v. Charlesworth*, 4 B. & C. 574; *Greaves v. Hilliard*, 15 C. P. 326; *McMullen v. McDonnell*, 27 U. C. R. 36, were cited on the argument.

HAGARTY, J., delivered the judgment of the Court.

We are of opinion that the learned Judge was correct in his view of the law. We do not see how the plaintiff can, on the evidence, be held to be a purchaser from the Crown in possession; no contract of purchase seems to us to be created by what took place. The plaintiff went to the agent, and got a memorandum from him shewing the amount of the first instalment which would be required to be paid if he took the lot, and he told the agent it was probable he would buy it. His payment to the Bank, and the letter from the Department, saying formally that his communication would receive attention, cannot by themselves amount to a contract, as the agent explains the whole course of dealing. The Crown had previously licensed the defendant to cut the very timber in dispute on this lot, and we have already, in several cases, expressed our views as to the effect of these licenses. The exception at the end of the license of lots already sold ought not, we think, to be extended to a case like the present, where the plaintiff never completed the very simple form required to make him a purchaser. It was shewn that had he done so the lot would not have been included in the license. The money already paid on the land will, no doubt, be refunded to him on application.

Rule discharged.

GOULD V. BRITISH AMERICA ASSURANCE COMPANY.

Insurance—Plea of arson—New trial refused—Condition—Leaving premises unoccupied.

In the absence of misdirection, where the jury find in favor of a party on an issue charging him with a criminal offence, the Court will rarely grant a new trial.

In this case, in an action on a fire policy, defendants gave such evidence to shew that the house had been burned by one K., by the plaintiff's procurement, as would well have warranted a finding for defendants. K., however, had been indicted for the arson, and acquitted. The jury having found for the plaintiff the Court refused to interfere.

The policy provided that in case of any alteration or addition, &c., or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk was increased and a consequent additional premium would be required, the insurance should be void in default of notice and allowance thereof. Defendants alleged, as a breach of this condition, that the premises which, when insured, were occupied by the plaintiff's tenant, became vacant and unoccupied without defendants' knowledge or consent, whereby the risk was increased and an additional premium would have been required, and that the plaintiff did not give notice of this change, nor was it allowed by defendants.

Held, that the plea was bad, for the mere ceasing to occupy was not within the condition. The jury also found the plea not proved.

DECLARATION on a Fire Policy upon a frame dwelling-house, for \$500.

Pleas: 1. *Non est factum*. 2. This plea became immaterial. 3. That the premises were destroyed by the fraud and procurement of the plaintiff. 4. That in and by the second condition or stipulation endorsed upon the said policy in the declaration mentioned, it is provided that in case any alteration or addition be made in or to any risk on which an insurance has been effected, whether such alteration or addition do consist in the erection on the premises of apparatus for producing heat, or in the introduction of articles more hazardous than may be allowed in the policy, or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk is increased and a consequent additional premium would be required, and whether such insurance has been effected on the building itself, or on goods, wares and merchandize deposited therein, and the assured shall not have given notice thereof respectively to the said Company, or its agent, in writing, and unless such alteration or addition shall be

allowed by endorsement on the policy, and such increased premium paid as may be required, such policy or insurance shall be null and void. And the defendants say that in and by the requisition for insurance in the declaration mentioned the dwelling-house therein described was represented by the plaintiff to be and the same was in the occupation of a tenant of the plaintiff; and that after the making of the said policy, and before and at the time of the said loss, the said dwelling-house became vacated and unoccupied, without the knowledge or consent of the defendants, whereby the said risk was increased, and a consequent additional premium would have been required. And the defendants further say that the plaintiff did not give notice in writing of the said dwelling-house being unoccupied, and of such change in the nature of the occupation of the said dwelling-house, to the defendants or their agent, nor was the same allowed by endorsement on the said policy.

The plaintiff took issue on the pleas, and demurred also to the fourth, on the grounds:

1. That said second condition or stipulation referred to in said plea as endorsed on the policy, is silent as to the premises becoming vacant or unoccupied during the time or period of insurance: the non-occupation of the premises covered by the policy does not come within the said condition, and it can only be held to apply to or cover an alteration or addition in or to any risk, or change in the nature of the occupation, by which the degree of risk is increased: the premises being unoccupied or vacated by the tenants could not be held to be, and is not a change in the nature of the occupation, or such alteration or addition as is required by said condition or stipulation to be notified to the Company, or such an alteration or addition as required to be allowed by the Company by endorsement on the policy; nor is the omission to give notice, or the omission to obtain an allowance thereof by endorsement, such as would vacate said insurance and render said policy null and void.

2. That although the defendants do allége in and by the plea that the said premises became vacated and unoccupied,

yet they do not allege that that was a breach of the said condition, or that it was an alteration or addition to the risk, or a change of occupation requiring notice to be given and an allowance thereof to be endorsed on said policy, and said plea does not shew a sufficient breach of said condition to constitute a defence to this action, or to vacate said insurance and render the policy null and void, within the meaning and true intent of said condition; and the said plea shews no defence in law to the plaintiff's right of recovery herein, nor does it state sufficient to bring the defence set up within the said second condition.

The plaintiff was allowed to try the issue in fact first, and the case was tried at Belleville, before Adam Wilson, J.

Evidence was given of the destruction by fire of the premises on the morning of the 30th January, 1866, and the arrest of a man named Kimmerley, on the very strongest suspicion of having caused the fire. There seemed no doubt but that it was the work of an incendiary. It had been once before set on fire, and on the night in question one Bartlett, the station master of the Grand Trunk Railway, at Shannonville, saw a man inside the building, just before the fire broke out, with a lighted brand in his hand. He came out of the door, and went along the main road. Bartlett ran to the stable, took a horse, and followed him, and the person he caught up to turned out to be Kimmerley. He had not kept him in sight however from leaving the house till he caught him, nor did he know Kimmerley till after the arrest. The building was about nine miles from the plaintiff's residence.

Kimmerley was tried for the arson, and acquitted.

To connect the plaintiff with his act it was proved that Kimmerley had been working for the plaintiff, and was there on the night of the fire.

It was sworn that the plaintiff said he could not make himself believe that Kimmerley could do such a thing; that he knew Kimmerley was a respectable man, and he did not believe he did it, and he was very anxious for him to be acquitted, and that rather than have anything

happen to him he (plaintiff) would give up his claim on defendants. He told the defendants' agent the house was unoccupied at the time of the fire, and had been so for a long time : that he believed Kimmerley had burned the place ; that he was sorry he was arrested ; that he always thought him an innocent young man ; that he had said he did not care about his insurance money if Kimmerley were let off.

On the day of Kimmerley's arrest, the plaintiff said to the man who had arrested him that he thought he (the witness) could get him off ; that he was willing to give up his insurance money, pay the costs of the arrest, and make the witness a present.

Another witness said the plaintiff told him he was afraid he had got himself into a bad scrape, that if he went to the Penitentiary for it some people would be glad ; witness said, many a man had had his house burned, and it was not supposed he had done it himself ; he did not deny that it had been talked of in his own house about burning the building, but that he had told William (meaning, as witness supposed, Kimmerley) not to do it.

Evidence was given by defendants that they considered an unoccupied building an extra risk : that if a vacancy happened the policy would be cancelled, unless it was likely to be occupied in a few days.

An insurance agent, called by the plaintiff, said he never charged extra premium, nor required notice.

The learned Judge expressed an opinion unfavourable to the legal sufficiency of the plea, saying that the evidence shewed the building was vacant and no notice given ; but he asked the jury, 1st. Was there a change in the nature of the occupation. 2nd. Was the risk increased, and a consequent additional premium required ; remarking that the evidence rather shewed that the vacancy increased the risk and the premium required.

He left the third plea, of arson, to the jury, with remarks rather unfavourable to the plaintiff.

It was objected by defendants that the learned Judge had expressed the opinion that there was not a change in

the nature of the occupation, and that the words "or in any other manner whatsoever" did not apply to such a change as here. But the learned Judge added that he left it to the jury to say whether there was a change in the nature of the occupation by reason of the vacancy.

The jury found for the plaintiff, \$500.

G. D'Arcy Boulton obtained a rule *nisi* for a new trial, for misdirection, in telling the jury that the fact of the building having become vacant and the failure to notify was not a breach of condition under the fourth plea; or for a new trial on the law and evidence, or weight of evidence, and the verdict being against the Judge's charge.

J. E. Henderson shewed cause.

The demurrer was argued at the same time.

Henderson, for the plaintiff, cited *Stokes v. Cox*, 1 H. & N. 320, In Appeal, 533; *Baxendale v. Harvey*, 4 H. & N. 445; *Hobson v. Western District Mutual Ins. Co.*, 6 U. C. R. 536; *Todd v. Liverpool and London Ins. Co.*, 18 C. P. 192; *Derbyshire v. Feehan*, 12 C. P. 502; *Richardson v. Canada West Farmers' Ins. Co.*, 17 C. P. 341; *Thurtell v. Beaumont*, 1 Bing. 339; *Willmetts v. Harmer*, 8 C. & P. 695; *Tay. Ev.* 4th ed. 122-3.

Boulton, for the defendants, cited *Dickson v. Equitable Fire Assurance Co.*, 18 U. C. R. 246; *Attorney General v. Rogers*, 11 M. & W. 670; *Regina v. Johnson*, 2 E. & E. 613.

HAGARTY, J., delivered the judgment of the Court.

As to the evidence in the plea charging the plaintiff with procuring the building to be burned, the case is certainly one of the gravest suspicion against the plaintiff. But the defence lay under the very great disadvantage of having to try to fix guilt on an accessory before the fact, after the acquittal of the principal. The only charge was that the plaintiff procured *Kimmerley* to burn the building. The latter has been tried, and declared not guilty.

It may be quite true that such acquittal, or even the acquittal of the plaintiff himself, would not be a bar to a find-

ing against the plaintiff in this action, but the defence has to contend with the well-known feelings of jurors generally to accept the verdict of not guilty as an irreversible settlement of the whole question, and they naturally argue that as Kimmerley has been found innocent of the act of arson, the plaintiff must be also innocent of having procured him to commit it.

Although there are not many reported cases on the subject, we think it has been a fairly understood rule on the subject of new trials, that, in the absence of misdirection, where a jury find in favour of a party expressly charged with a criminal offence, the Court will rarely subject him a second time to the finding of a jury.

In *Lambkin v. Ontario Marine and Fire Insurance Co.* (12 U.C.R. 583), in an action on a fire policy, the defence was that the plaintiff had fraudulently delivered an account of his loss, stating it at £1,500, while the true value was £500, and swearing falsely thereto. After verdict for the plaintiff, on motion for a new trial, Burns, J., delivering the opinion of the Court, that they would have been better satisfied had the verdict been for the defendants, proceeded to say: "The case was fairly enough submitted to the jury, and, of course, the credit to be given to the witnesses rested with them. We feel that upon this point, inasmuch as the trial not only involved the plaintiff's character for honesty, but that, if defendants' suspicions be true, the plaintiff would be subject to a criminal prosecution, we cannot, where the jury are the judges, and the case has been properly submitted to them, interfere."

In *Dickson v. the Equitable Fire Assurance Co.* (18 U.C.R. 246), the defence was a fraudulent overvaluation in making the application, no perjury apparently being charged. The Court granted a new trial on the evidence, nothing being said in the judgment on the subject now under discussion. The plaintiff obtained a second verdict on nearly the same evidence, which the Court refused to disturb.

We have not been referred to any case more directly in

point than those cited. We consider, however, the ordinary understanding of the practice as to new trials to be generally, though of course not at all conclusively, as stated by Burns, J.

Now, in the present case, if the plaintiff had been upon his trial for the arson, or as an accessory, the proof against him would rest almost wholly on his own statements. Had he kept silence there would be no evidence whatever. It might be very strongly put for him that most of, if not all, his expressions were referable to an anxiety that Kimmerley—a person for whom and for whose family he always professed regard—should escape, and that to effect this he would willingly give up his not very heavy claim of \$500 on the defendants. His conversation with Fritz is the most serious against him. He spoke of being afraid he was in a bad scrape, and if he went to the Penitentiary some people would be glad. This was after Kimmerley's arrest, and when his supposed complicity was a matter of public talk. But we hesitate to say that if a jury, placing the most favourable construction possible upon his statements, had acquitted him, that such acquittal was so clearly against evidence that it ought to be set aside, if power to set it aside existed in a Court of Criminal Appeal.

After the acquittal of Kimmerley as the principal, the probability would be very great that, on the evidence before us, a jury would be likely to acquit this plaintiff.

We of course feel that there was evidence in the present case which might have well warranted a finding for the defendants.

The case of *Richardson v. The Canada West Farmers' Insurance Co.* (17 C. P. 343) shews the opinion of our Court of Common Pleas as to the necessity of evidence on such a plea, being as strong on a civil as on a criminal charge.

We do not, on the whole, see our way to, as it were, again putting the plaintiff on his trial for this serious charge.

On the question raised by the fourth plea, we are inclined

to agree with the view taken by the learned Judge. We are not prepared to hold that the clause in the policy is to be so construed that if the assured leaves home for a week, locking up his house, and a fire takes place during that time, his policy is avoided. A "change in the nature of the occupation" does not, we think, point at a mere temporary cesser of the occupation, but rather to an application of the premises insured to a purpose different from that described in the application. If the underwriters desire to guard themselves against loss on unoccupied buildings, or to make continued residence a condition precedent to the right of recovery, in the case of a building described as a dwelling-house occupied by a tenant, we think they must use express language to meet the case.

This Court, in *Hobson v. The Western District Mutual Fire Insurance Co.* (6 U. C. R. 536), under a plea setting out a provision that where there was a change of occupation the policy should be approved by the Company, and averring that the plaintiff, though the occupier when the insurance was effected, was not so at the time of the fire, but that A. B. was, and that fact was not communicated to defendants, held "that a mere change of occupant, without other alteration in the manner or purpose of occupation," was not within the provision.

Mr. Boulton urged that, at all events, this objection would lie under the words "or in any other manner whatsoever." It seems to us, however, that as the alleged avoidance of the policy is stated to be the ceasing of the fact of occupation, then if such ceasing do not properly fall within the legal meaning of the condition, the general words cannot help him.

In any event, we think the whole condition rests in the words "by which the degree of risk is increased, and a consequent additional premium would be required," and that it must be left to the jury to say if the risk be increased, otherwise we should have to construe the clause as a warranty that no change should take place whether the risk be thereby increased or not; or, in the amusing illustra-

tion of the late Chief Baron Pollock, if premises in which fireworks were made were insured, and there was a provision that no alteration should be made without notice, but afterwards the premises were converted into an ice-house, would that vitiate the policy? *Stokes v. Cox*, (1 H. & N. 332).

The late decision of the Common Pleas in *Todd v. Liverpool and London Insurance Co.* (18 C. P. 200) on a condition almost identical in its language with this, shews that "as alterations generally are not prohibited, but only such as did increase the risk, and as no increase of risk was found, the defendants must fail on that part of their rule."

The facts there were far stronger against the plaintiff than here, as an elevator was put in without notice after effecting the policy, and the underwriter's agent who effected the insurance swore that a higher rate of insurance would be required for a building in which such an elevator might be placed, according to the Company's tariff.

We refer to *Stokes v. Cox*, in error, (1 H. & N. 533,) and to *Baxendale v. Harvey*, (4 H. & N. 445) which shew the strictness with which these conditions are construed, and that the question of increase of risk is to be submitted to the jury. In the latter case Martin B. says, "*Stokes v. Cox* is an authority that, if the insurers wish to make it a condition precedent to the validity of the policy that there shall be no alteration in the circumstances, whether the risk is increased or not, they must do so in distinct terms."

As the question of increase of risk was here left to the jury, and they found in the negative, it would dispose of the point against defendants even if their construction of the clause be correct, and we do not see that on the weight of evidence we could interfere with the verdict.

But on the demurrer we have to determine the point of construction, and on that, as already intimated, we are against defendants' view. We think the plaintiff entitled to judgment on the demurrer.

On the motion for a new trial we have come to the conclusion that, taking all the circumstances of the case and

the effect of the evidence into consideration, we ought not to interfere. We lay down no absolute rule of practice, but confine ourselves to what we consider the principle on which a case like the present should be governed, on its peculiar facts.

There would, we think, be little advantage to defendants in sending the case down again. There will always be great practical difficulty in persuading a jury to convict a man of procuring another to commit an offence, after that other has been acquitted of the offence itself. The present plaintiff's guilt is utterly inconsistent with Kimmerly's innocence.

*Rule discharged. Judgment for
plaintiff on demurrer.*

LESLIE V. LONG AND MAIR.

Guarantee—Construction.

Defendants on the 20th April, 1867, guaranteed, in writing, the payment to the plaintiff, a nursery gardener, of his account against H., for nursery productions to be delivered to H. that Spring, said payment to be made to the plaintiff by H., or the defendants, within twenty days after receipt of the trees by H.

On the 4th February preceding an agreement under seal had been executed between the plaintiff and H., that the plaintiff should deliver trees at railroad stations, at the prices mentioned, in such quantities as H. might sell, for which H. agreed to pay one half ten days after delivery of the trees, and to give his note, endorsed, for the balance, payable in six or eight months from delivery, or the notes of the purchasers.

In an action on the guarantee it appeared that the balance due by H. in all, for deliveries after the guarantee, was \$460.22, of which \$60 was due on the cash part of the transaction, and only this part had been entered by the plaintiff in his day book; for the rest he held purchasers' notes.

Held, that the guarantee clearly could apply only to the \$60.

DECLARATION, that in consideration that the plaintiff would deliver nursery trees, &c., to one Hogg, on certain terms of dealing and prices then agreed between them, defendants guaranteed the plaintiff for the due payment of

the price thereof, to be delivered to Hogg during the Spring of 1867, such payment to be made to the plaintiff by Hogg or by defendants within twenty days after receipt thereof by Hogg; and the plaintiff delivered during that Spring said productions to Hogg, who received them on said terms of dealing between them at said prices, amounting to \$863.75. Breach, that though more than twenty days elapsed from the receipt of said productions, &c., neither Hogg nor defendants had paid.

Pleas—*Non-assumpsit*, and payment by Hogg.

The case was tried at Toronto, before *Gwynne*, Q. C.

The guarantee was put in and admitted, dated 20th April, 1867, as follows:—"I hereby guarantee to Mr. George Leslie, of the Toronto Nurseries, the payment of the amount of his account against Mr. J. H. E. Hogg, of Port Perry, for nursery productions to be delivered to Mr. Hogg this spring, said payment to be made to Mr. Leslie by Mr. Hogg, or his undersigned surety, within twenty days after receipt of the trees, &c., by Mr. Hogg."

(Signed) JAMES LONG

ROBERT MAIR.

An agreement under seal of the plaintiff and Hogg was put in by the plaintiff, dated 4th February, 1867. A schedule of prices was annexed. It provided that the plaintiff would deliver at railroad stations, &c., fruit trees, &c., well packed, in such quantities as Hogg might make sale of, and at the scheduled prices. Hogg agreed to take orders for the trees and deliver them to the parties ordering them, and to pay the prices to the plaintiff, and so much for the packing boxes. Hogg was to pay cash to the amount of one-half of the plaintiff's account against him immediately, say within ten days after delivery of the trees, and to give his note endorsed by a responsible person for the remainder, due six or eight months from date of delivery, or notes of parties to whom he had delivered trees; to take orders only for the plaintiff that spring; orders to be delivered two weeks before delivery of the trees.

The plaintiff's son was the only witness. He proved the sealed agreement. The trees were delivered to Hogg after the date of defendants' guarantee. He proved an account of deliveries to \$815.75. Many payments were made by Hogg, leaving a balance due of \$460.22. The witness said the agreement was for half cash and half in notes; he was either to give his own or purchasers' notes. An account was produced shewing a balance due on the cash part of the transaction of \$60. Witness said he had one or two notes of Hogg endorsed by defendant Long, but he preferred the notes of the purchasers. There appeared to have been a settlement of accounts on the 6th June. In the plaintiff's day-book only the cash part of the dealings were entered, because the residue was to be paid by notes.

For the defence *McMichael* contended that at most only \$60 could be claimed from the sureties; that the goods were not delivered under the guarantee, but under the previous agreement, and the provision as to taking notes discharged the sureties.

The learned Queen's Counsel held that the sureties were only liable for the cash part.

It was agreed that the verdict should be entered for the plaintiff for \$60, leave being reserved to the plaintiff to move to increase it to \$460, and to the defendants to enter a verdict for them, as the Court might determine as to the effect of the guarantee and the evidence.

Harrison, Q. C., for the plaintiff, and *McMichael* for defendants, obtained rules on the leave reserved.

Harrison, Q. C., for the plaintiff, cited *Brown v. Langley*, 4 M. & G. 466; *Price v. Kirkin*, 3 H. & C. 437; *Lee v. Jones*, 17 C. B. N. S. 482; *Bingham v. Corbitt*, 34 L. J. Q. B. 37; *North British Insurance Company v. Lloyd*, 10 Ex. 523; *Walton v. Mascall*, 13 M. & W. 452.

McMichael, contra, cited *Whicher v. Hall*, 5 B. & C. 276.

HAGARTY, J., delivered the judgment of the Court.

At the argument a good deal was said about the form of

the pleadings, but we cannot find that anything was said at *Nisi Prius* on that subject, and we think, as the rules are merely on the leave reserved, we should dispose of the case broadly on the merits.

We agree with the learned Judge that the plaintiff cannot possibly recover any thing beyond the cash balance due.

After the guarantee was given, the plaintiff clearly dealt with Hogg on the footing of the agreement of February, and took from him thereunder various customers' notes, preferring them, as the witness said, to certain notes endorsed by one of these defendants, and in his books only entered this part of their dealings, considering the other half to be payable by notes.

In the view most favourable to the plaintiff we can only regard the guarantee as applicable to that part of his claim on Hogg which the latter had to pay in cash, and certainly not to that part which was to be settled by customers' notes, at uncertain dates, or endorsed notes at six or eight months. The guarantee that payment should be made in twenty days after receipt of the trees could not apply to anything but what Hogg had to pay in money, or at all events otherwise than by the notes mentioned.

Hogg was no party to the guarantee, and the plaintiff could not contend as against him that its effect was to vary the prior sealed instrument.

Our difficulty has been chiefly in seeking to uphold the guarantee for any purpose.

No explanation has been offered at the trial as to what led to the giving of the guarantee after the apparently complete arrangement of February. Assuming that nothing was improperly concealed from defendants, the facts at the date of the guarantee would stand thus:—The plaintiff had not then made any deliveries of trees. Under the agreement of February he would have security for half Hogg's liability by endorsed notes or purchasers' notes; for the other half Hogg was to pay in ten days from delivery. If, therefore, we are to attach any force or meaning to the guarantee, it may be read that, as to that portion of the account which

Hogg had to pay in a named time after delivery of the goods, Hogg would pay, or the sureties would pay for him, within twenty days.

Had the number of days been reversed, and the guarantee accelerated the time of payment, we do not see how it could have availed for any purpose, as if the sureties paid at the end of ten days they could not have the plaintiff to proceed against him before the later period of twenty days, according to the well known rule.

But it is no burden on them that Hogg had contracted to pay at an earlier date; they could only be in default by his omitting to pay at the later date, and no rule would apparently be violated.

The guarantee either means this or nothing, and on the doctrine of "*ut magis valeat quam pereat*," we think we may hold the liability as existing to the extent of the unpaid cash account, namely, \$60.

We therefore discharge both rules.

Rules discharged.

IN THE MATTER OF A PLAINT IN THE SECOND DIVISION COURT OF THE COUNTY OF HALTON, BETWEEN ROBERT SWANTON APPELBE, PLAINTIFF, AND CHARLES BAKER, DEFENDANT.

Division Court—Application for new trial—Death of Judge—Power of his successor—C. S. C. chap. 5, sec. 6, sub-sec. 23.

A suit in the Division Court having been tried on the 18th of July, before a Deputy Judge duly appointed, on the 22nd the defendant duly applied for a new trial, by which, under Rule 52 of the Division Courts, proceedings were stayed. The Judge died on the 26th; the Deputy Judge before whom the case had been tried did nothing in the matter; and the new Judge was not appointed until October. In January following he ordered a new trial.

Held, that he was authorized to do so, under sec. 107 of the Division Courts Act, Consol. Stat. U. C. chap. 19, and the Interpretation Act, Consol. Stat. C. chap. 5, sec. 6, sub-sec. 23, taken together.

BEATY obtained a rule during last Hilary Term, calling upon the plaintiff Appelbe and Thomas Miller, Esquire, the

Judge of the County Court of Halton, to shew cause why the order made herein, on the 1st February last, by the learned Chief Justice of this Court in Chambers, directing a writ of prohibition to issue, should not be rescinded and set aside, on the grounds, amongst others, that a writ of prohibition should not issue, as the new trial ordered in the plaint by the Judge of the County Court was within his jurisdiction, and he had the right to hear and determine the application therefor made to his predecessor, Judge Davis, in his lifetime, and within fourteen days after the trial of the plaint : that the said application not being disposed of by Judge Davis in his lifetime, he having died on the 26th day of July, 1867, and the trial having been held on the 18th of July by his deputy, whose functions ceased when his principal resumed them, and the application being made to him before his death, proceedings were stayed, and the new Judge properly and legally took up the said application, and had power to determine and dispose of the same.

It appeared from the affidavits and papers filed, that in the month of June, 1867, a suit in the second Division Court of the County of Halton was pending between the parties : that the then Judge of the County Court, the late Judge Davis, being in ill health, under the authority of the 17th section of the Division Courts Act, Consol. Stat. U. C. ch. 19, on the 29th June, 1867, appointed Mr. Mathieson, a barrister, to act as his deputy : that that gentleman, on the 18th July, 1867, held the Division Court and tried the suit in question, a jury being empanelled for that purpose, and a verdict was rendered for the plaintiff for \$40 : that on the 22nd July the defendant made an application for a new trial, and his affidavit setting out the matter upon which he relied for a new trial, with the grounds of motion endorsed on it, was delivered on the same day to the Clerk of the Court, and shortly afterwards an affidavit of service of copies of the same on the plaintiff was also delivered to him, in pursuance of the 52nd rule of the Division Court Rules : that Judge Davis died on the 26th

July: that the papers and motion for a new trial were never laid before the deceased Judge or Mr. Mathieson his deputy, the latter gentleman being of opinion that his appointment ceased upon the death of the Judge: that no successor was appointed until the month of October, when the present Judge Miller was appointed, and soon after the application and papers for a new trial were transmitted to him: that on the 14th of January last he granted an order for a new trial, and on the 22nd January the plaintiff obtained a summons for a writ of prohibition, prohibiting all proceedings on the order for a new trial, and on the 1st February the order now moved against was made, which ordered a writ of prohibition to issue prohibiting the Judge from further proceedings on his order granting a new trial, and prohibiting him from preventing the plaintiff from taking proceedings on his judgment.

The principal question for determination on this motion was, whether the application for the new trial could be properly entertained and disposed of by the present Judge, all the necessary preliminary steps having been taken in due time by the defendant to entitle him to have had his application heard by the late Judge, if he had lived.

During this term *Osler* shewed cause. *C. S. Patterson* supported the rule, citing *In re Hoey v. McFarlane*, 4 C. B. N. S. 718, 735; *Leslie v. Emmons*, 25 U. C. R. 243.

The Statutes cited are referred to in the judgment.

MORRISON, J., delivered the judgment of the Court.

We find nothing in the County Courts Act, or the Division Courts Act, expressly providing for the contingencies that might arise in the event of the death, removal, or resignation of a Judge, and if no other enactment could be found to meet what would appear to be a *casus omissus*, the effect would, in many cases, work great hardship to suitors.

But we think it is clear that the intention and object of the Legislature in passing the 23rd sub-section of the 6th

section of the Interpretation Act, Consol. Stat. C. ch. 5, was by that general provision to provide for such contingencies, and to avoid the mischief which might result from the omission of any like provision in any Act of the Legislature.

That section enacts that "Words directing or empowering a public officer or functionary to do any act or thing, or otherwise applying to him by his name of office, shall include his successors in such office, and his or their lawful deputy." And the 107th section of the Division Courts Act, Consol. Stat. U. C. ch. 19, provides that "The Judge, upon the application of either party within fourteen days after the trial, may grant a new trial;" and if we read that section by the light of the Interpretation Act, it would read, "The Judge or his successor in office," upon the application, &c., may grant, &c. Here the application was made within the fourteen days and the Judge died within the same period, and his successor, as soon as convenient after his appointment, disposed of the application, the proceedings being stayed by the delivering of the application for a new trial to the Clerk, by the 52nd rule of the Division Court Rules, until the Judge's decision was known.

The fact of the Crown not appointing for some time a successor to the deceased Judge, ought not to deprive a party of any right, or place him in a worse position.

For these reasons, we are of opinion that the Judge of the County Court could properly dispose of the application for the new trial, and that this rule should be made absolute. In a case like this we would strive to avoid a failure of justice; and we refer to the case of *Leslie v. Emmons et al.* (25 U. C. R. 243), lately decided in this Court, as shewing how far the Court will go in a case somewhat similarly situated.

Rule absolute.

EATON V. THE GORE BANK.

Maliciously issuing attachment—Insolvency—Defects in the process.

The first count was for maliciously making affidavit of debt, of the plaintiff's insolvency, and of his intention to remove and dispose of certain goods with intent to defraud defendants, and thereby procuring an attachment, and the plaintiff to be declared an insolvent—alleging that the attachment and proceedings were afterwards set aside. The second count was in trespass for seizing plaintiff's goods.

Held, as to the first count, that the fact of the affidavit of defendants' agent as to removal of the goods not being corroborated by two witnesses, as required by the Act, was no objection, for by the form of action the plaintiff conceded the process to have been legal, and relied on its having been issued maliciously.

On the second count, the jury were told that if the attachment had been set aside, the plaintiff was entitled to a verdict; and the plaintiff objected that as the setting aside had been proved, it should not have been left as if open to doubt. The jury having found for defendants.—

Held, that the charge was unobjectionable; and as on the evidence nominal damages only would have been sufficient, the Court refused to interfere.

DECLARATION. First count.—That the plaintiff was a miller, &c., and the defendants maliciously and without reasonable cause, &c., procured one Parke, their agent, maliciously to make affidavit that the plaintiff was indebted to defendants in \$18,000: that to the best of his belief the plaintiff was insolvent within the meaning of the Statute, and liable to have his estate placed in compulsory liquidation; and that his reasons for so believing were, that the said debt was due and unpaid, and he had frequently asked the plaintiff for payment; and that the plaintiff had not the means or property, as he verily believed, sufficient to pay said claims in full; and that he had good reason to believe and did believe that the plaintiff and his co-partner McWhirter were immediately about to remove certain grain in a store-house in Woodstock, and dispose of the same, with intent to defraud the defendants;—and that the defendants did, in like manner, &c., procure one J. G. Edington and one Turquand, to make certain affidavits that to the best of their belief (to same effect, except as to removal of the grain), and did maliciously, &c., thereby satisfy the County Judge that the defendants were creditors, that the

plaintiff was insolvent, and liable to compulsory liquidation, and procured him to order the issuing of an attachment at the defendants' suit under the Statutes, and placed it in the Sheriff's hands, whereby his property was attached, &c., and procured the plaintiff to be declared an insolvent—whereas he was not insolvent, nor was his estate liable to compulsory liquidation, nor was said debt a debt on which an attachment could issue; and that afterwards, before this suit, the plaintiff petitioned to set aside the attachment, and the Judge determined that the plaintiff's estate had not become subject to compulsory liquidation, and that the order and the attachment and all proceedings should be set aside, and the Sheriff should withdraw, &c.,—setting forth special damage.

The second count was in trespass for seizing the plaintiff's goods.

Pleas—1. Not guilty.

2. To the second count, setting out the application for the attachment and its issue, and justifying under it.

Replication.—That the order and writ, &c., were set aside, on petition, by the Judge. Issue.

The case was tried at Woodstock, before Draper, C. J.

Evidence was given of the making of the affidavits mentioned in the first count, and the order, and issuing of the attachment. Mr. Parke, the Bank Manager at Woodstock, swore to a debt of \$18,000, on certain bills and notes set out.

The petition to set aside the attachment denied all the allegations, and insisted that a mortgage had been given to secure the debt on the bills and notes, and thereby defendants had given time to the plaintiff, and so the debt was not due.

A large amount of evidence was given as to the financial position of the plaintiff.

It was objected for defendants that Parke's authority to bind defendants was not shewn: that there was no evidence to shew that Parke had no reason to believe what he swore to as to fraudulent removal of goods: that

the insolvency was proved : that a chattel mortgage given to one Clarke, proved in evidence, was a fraudulent preference, and an act of insolvency.

And as to the second count, that proceedings in insolvency are judicial, and no person is responsible for acting under the Judge's authority, and the attorney who issues the attachment is not connected with defendants.

The learned Chief Justice held that there was no want of reasonable or probable cause shewn, and, as the plaintiff's counsel suggested, directed a verdict for the defendants on the first count. On the second count he held there was evidence on not guilty to sustain the plaintiff's case, and left it to the jury on the question was the writ set aside, directing them, if so, to find for the plaintiff.

To this the plaintiff objected that the jury should have been directed to find the second issue for the plaintiff, instead of leaving it to them. The jury found for the defendants.

In Michaelmas Term, *Anderson* obtained a rule for a new trial as to the first count, for misdirection in ruling that there was no evidence of want of reasonable and probable cause or of malice, and in ruling that it was open to the defendants to contend that the attachment was rightfully issued, notwithstanding it had been set aside ; and on the ground that Parke's affidavit was not corroborated by two witnesses as required by the Statute ; that the debt was merged in the mortgage ; that it was not a joint debt of McWhirter and Eaton, and so could not support the attachment ; and that time was given ; and as to the second count, that the verdict was perverse, contrary to law and evidence, and the Judge's charge, and the weight of evidence ; and for nondirection, the learned Judge not having directed a verdict for the plaintiff on the second count.

M. C. Cameron, Q. C., and *Crombie*, shewed cause, citing *Williams v. Smith*, 14 C. B. N. S. 596 ; *Cooper v. Harding*, 7 Q. B. 928 ; *Daniels v. Fielding*, 16 M. & W. 200 ; *Prentice v. Harrison*, 4 Q. B. 852.

Anderson supported the rule, and cited *Chivers v. Savage*, 5 E. & B. 697; *Grant* on Banking, 532.

HAGARTY, J., delivered the judgment of the Court.

From our examination of the evidence adduced by the plaintiff, which we may assume presents his case in the most favourable light, our conclusion is wholly against his assertion of solvency.

One judgment in the case of the *Gore Bank v. Eaton*, (ante p. 332), given last Term, disposes of the objection that time was given to the plaintiff by this mortgage, nor can we see any objection to defendants pursuing all their remedies on the paper held by them. The amount for which the defendants might be allowed ultimately to prove on the estate does not, we think, prevent them (assuming them not to be fully secured) from having a good debt to support an attachment, and this record does not base the cause of action on the defendants having claimed too much.

The objection as to Parke's affidavit not being supported by two witnesses, as to the alleged intention to remove the grain, may have been good ground for setting aside the writ; but the count seems based on the express ground that a process, legal in its origin, has been issued maliciously and without reasonable or probable cause, not that the legal process is defective, not as grounded on materials technically insufficient, but false in fact. By adopting this form of action we think the plaintiff concedes the legal sufficiency of the attachment as a process capable of effecting what it has effected against him, and claims damages for its injurious effects, just as the man held to bail brings a like action for the legal results of the arrest, in which case he would not be heard urging technical objections to its form or to the formal sufficiency of the affidavits on which it issued, except so far as any such matter might bear on the question of reasonable or probable cause. Here the gist of the inquiry was, not whether two persons corroborated Parke's statement respecting the apprehended removal of the grain, but whether the defendants or their

agent made such statement without probable cause. Little if any evidence appears in the Judge's notes to raise a belief of the absence of such cause, and the burden of doing so was, of course, on the plaintiff. We think it was open to the defendants to establish the existence of probable cause in any way at the trial, from any facts capable of proof.

We do not think that we can say that the learned Chief Justice was wrong in ruling as he did on the first count.

On the second count, unless there was positive misdirection, we should not interfere with a verdict for the defendants in a case like that presented at the trial.

The jury were properly told that if the attachment had been set aside, the plaintiff was entitled to a verdict.

The plaintiff objects to this form of direction, because he says it should not have been left as if open to doubt. But this seems to us to be a mere verbal criticism, and the charge not open to any objection.

Had the jury found for the plaintiff with nominal damages, the Court would not think of setting aside the verdict because substantial damages should be awarded.

It was wholly a question for the jury, and on such facts as appeared in evidence we think, in the absence of misdirection, it would be unfair to the defendants to deprive them of their verdict.

Rule discharged.

THE YORKVILLE AND VAUGHAN PLANK ROAD CO.
V. BALDWIN.

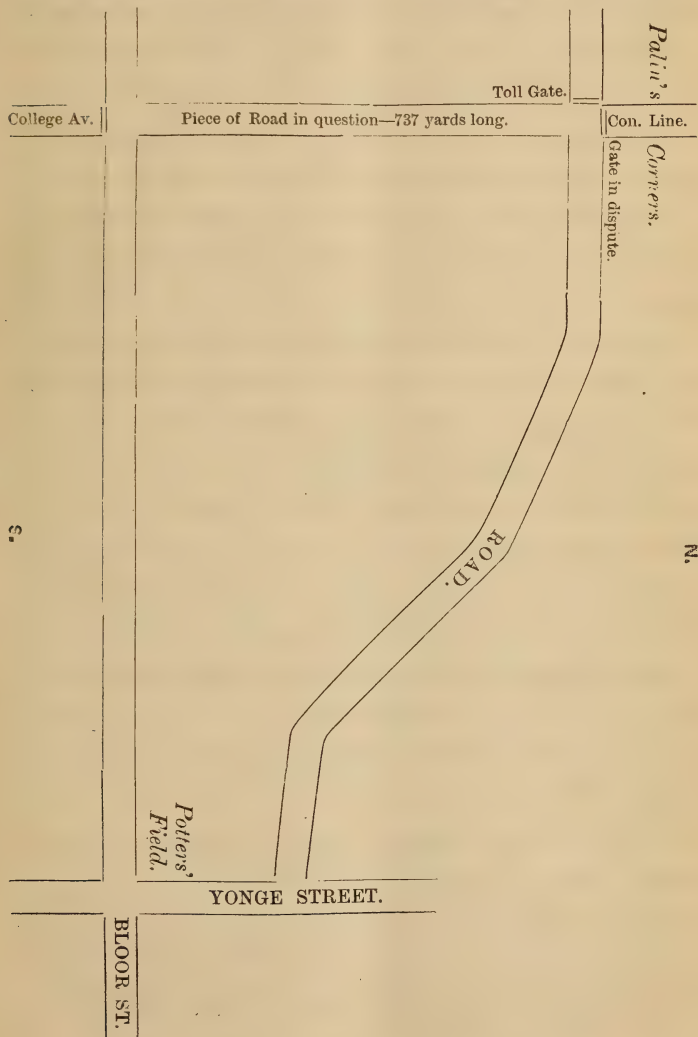
Road company—Tolls—C. S. U. C. ch. 49.

Plaintiffs were a road company incorporated under Consol Stat. U. C. ch. 49. The road ran easterly towards Yonge Street till it came to a concession line running north and south, and then along this line to the south, a distance of 737 yards, where it ended. The main toll-gate was placed across their road just before it touched the concession line turning south, and they afterwards put a bar on the north side of their road across the concession line where it entered from the north, at which they claimed to collect toll from persons travelling north and south.

Held, that such claim was unauthorized, for (among other reasons stated in the judgment) such bar was not a check upon any toll-gate, and in passing it no gate was avoided.

THIS was an action brought to recover from the defendant \$5, for tolls due by him to the plaintiffs for the use of their road; and by consent, and by order of a Judge, a case was stated for the opinion of the Court without pleadings.

It was accompanied by the following sketch shewing the position of the gate and line of road, which is necessary for reference in order properly to understand the question :



It appeared that the plaintiffs were incorporated under the provisions of the 12 Vic. ch. 84, on the 16th June, 1849, for the purpose of constructing a plank road from the south-east corner of Potters' Field, on Yonge Street, now within the limits of Yorkville, to the division line between the Townships of York and Vaughan: that the line of road adopted by the plaintiffs proceeded from the terminus at the Potters' Field along the boundary between Yorkville and the City of Toronto, west, to the College Avenue, and then ran north along the Concession line to a point called Palin's Corners, on the Davenport Road, and then west on the Davenport Road,—the portion of the road now in question, and for passing over which this action is brought, being between Palin's Corners and the College Avenue.

It also appeared that the Village of Yorkville was incorporated on the 1st January, 1852, and on the 21st September, 1854, the municipality passed a by-law, which recited that it was for the benefit of the village, as well as of the plaintiffs, to alter their line of road by extending it easterly from Palin's Corners to Yonge Street, instead of the line then used (being the part now in dispute); and it enacted that it should be lawful for the plaintiffs to alter and extend their road from Palin's Corners easterly to Yonge Street, upon condition that they should keep the acquired portion in good order, as required by the Act incorporating the plaintiffs, and that all residents of Yorkville should be permitted to travel free of toll within the limits of the village; and that the plaintiffs should not remove their gate nearer than the easterly boundary of the Avenue at Palin's Corners, and that when they removed it, it should be placed at the south-east corner of the intersection at Palin's Corners.

On the day following the passage of this by-law the plaintiffs and the municipality entered into articles of agreement under seal, by which the municipality granted to the plaintiffs the new road, and the plaintiffs covenanted to perform and keep all the conditions and stipulations contained in the by-law. In pursuance of the agreement,

the plaintiffs took possession of the road so granted, and had since retained it and kept it in repair, and they also removed their toll-house and gate to Palin's Corners.

About the beginning of the year 1855, the road south of Palin's Corners, the portion now in question, became out of repair, and the plaintiffs removed the planks from it, and they ceased to demand toll from persons using it until the autumn of 1865, when they macadamized it, and they then reimposed a toll, the payment of which the defendant resisted, and the plaintiffs took no steps to enforce payment, and did not do so until the commencement of this action.

Previous to 1862, on the 1st January 1858, the Municipality of Yorkville addressed a communication to the plaintiffs, drawing their attention to the road now in question being out of repair, and in a dangerous state, and asking whether it was their intention to hand over that portion of their original road to the municipality as one of the streets of the village, and referring to the plaintiffs' agreement to place a check or bar gate on the south side of Palin's Corners, so as to turn the travel through the village. It was in consequence of that letter, and it not being the intention of the plaintiffs to abandon that portion of their original road, that they repaired the road and reimposed the toll.

It also appeared that afterwards, on the 16th of January, 1864, the municipality passed a by-law to remove doubts as to the intention of their by-law of the 21st September 1854, declaring that it was not contemplated by the by-law that the plaintiffs should relinquish their original road running southerly from Palin's Corners to the College Avenue.

It also appeared that the toll imposed by the plaintiffs in 1862, at the gate at Palin's Corners, on persons coming from the north, that is, by the concession line, to the College Avenue, or going north from thence to the concession line, was 1½d. on vehicles drawn by two horses, and by one horse 1d., each way; that since then the plaintiffs adopted a different charge, and imposed a toll on vehicles drawn by two horses of 4d., and by one horse 2d., each way.

The total length of the plaintiffs' road was eleven miles, and the other and only gate was six and a-half miles to the west and north of the one at Palin's Corners, at which other gate the like toll was charged, and the distance which might be travelled along the road from the side gate at Palin's Corners was 737 yards.

The question for the opinion of the Court was, whether the Company were entitled to demand toll at the said gate according to either rate imposed.

C. Robinson, Q. C., for the plaintiffs, cited *Little v. Dundas, &c., Road Co.*, 2 C. P. 399; *Regina v. Brown*, 13 C. P. 356; *Wilson v. Groves*, 17 U. C. R. 419; *Wilson v. Corporation of Middlesex*, 18 U. C. R. 348; *Ritchey v. Toronto Roads Co.*, 23 U. C. R. 62; Consol. Stat. U. C., ch. 49, secs. 32, 60, 75, 80, 81, 83.

Defoe, for the defendants.

MORRISON, J.—On the argument it was admitted that the first and main toll-gate at Palin's Corners is placed across the plaintiffs' road, on the west side of the concession line, at the angle where it turns and runs to the west, and that to the east of it, on the north side of the road and across the concession line, a side-gate or bar is placed, which is the gate complained of by the defendant, and which he contends the plaintiffs had no right to place there, or to exact toll for passing, as it forms no check-gate to any toll-gate, the first toll-gate being to the west of it, and on passing it from or to the concession line no gate is avoided.

The defendant, who lives north of Palin's Corners, has to pass this side-bar in going to the City by the College Avenue, and *vice versâ* on his return, and he contends that he is not liable to pay toll for passing from or to the concession line at this point; and he further contends that the circumstances shew an abandonment of the original portion of the road running south from Palin's Corners, by their assenting to the alteration of their road in continuing it

east to Yonge Street by the road granted to the plaintiffs by the municipality, in lieu of their road to Yonge Street by the Potters' Field terminus.

The question we have to determine is, whether the plaintiffs are entitled to place a gate or bar across the concession line, and to exact toll from the defendant at that point for passing it to and from the township road on his way from and to the City.

Assuming that the original line of road south of Palin's Corners has not been abandoned by the plaintiffs, and we cannot see that the circumstances stated would warrant us in holding that they did abandon it, we are of opinion that the plaintiffs are not entitled to exact toll at the gate in question. The gate is not placed across the plaintiffs' road, nor is it placed as a check-gate or side-bar within the meaning of the 80th section, *i. e.*, to be a check upon another gate, or to prevent a person passing off the road to avoid toll, nor with a view generally of preventing persons using the road in question without toll, for it appears that any person south of Palin's Corners can do so at pleasure, and may do so either in coming from Yonge Street by the Davenport Road, or in returning that way; but the gate is placed across the township road or concession, which is a continuation of the road in question, with the sole object of preventing a person passing from or to the concession line. In the one case toll is exacted because a traveller leaves the plaintiffs' road; in the other, because he passes this boundary to go south only. He is at liberty under the Statute, sec. 81, to pass this gate, assuming that it is rightfully placed there, to go along the Davenport Road east to Yonge Street, or any part of the village, and once on that road he can pass over the road in question, no other gate having to be passed.

If we were to hold that the plaintiffs are entitled to place this gate at this point, we would practically, by doing so, authorize them to have a short separate road, not a mile long, detached from their main road, with one terminus at Palin's Corners, the other at the Potters' Field, for passing

over which they could exact toll, contrary to the spirit of the 74th section of the Act, which requires at least two miles of road. The plaintiffs' right to exact toll on the road for which they were incorporated, as their gates are at present placed, commences at the toll-gate immediately west of the concession-line at Palin's Corners, and which in fact is the plaintiffs' first toll-gate, and it is when about to pass that gate the traveller's liability to pay toll begins, for any one can pass to and from Palin's Corners, using the whole or any part of the piece of road in question without the exaction of any toll. To put the case in a few words, the plaintiffs seek to charge toll, not for the use of that particular portion of the road, but for merely passing the open boundary of the township road or concession-line.

It was said on the argument that the plaintiffs could effect the object they have in view by placing their first gate at a point south of Palin's Corners. That question we have not now before us.

Our judgment is for the defendant.

Judgment for defendant.

GILCHRIST V. MARY ANNE RAMSAY, WILLIAM H. RAMSAY
ROBERT H. RAMSAY, AND SAMUEL J. J. RAMSAY.

Infant, avoidance of deed by—Ejectment—Tenants in common—Will—Construction.

A mortgage of land given by an infant is voidable only, not void; but it may be avoided during infancy, and defending by guardian an action of ejectment brought by the mortgagee is a sufficient act of avoidance. Where the action was against three, and two claimed only under the infant, admitting the plaintiff's right to two undivided thirds, but denying ouster: *Held*, that as the infant's right to one-third was established, the plaintiff without proof of ouster could not recover against the others.

Under a will directing that the testator's estate should be charged with the support of his wife during her life or widowhood, and devising it to his sons in fee, "subject to the devise hereinbefore contained in favor of my dear wife." *Held*, that the widow took no legal estate.

EJECTMENT, for two parcels of land, the north eighty acres of lot 17, in the first concession of Hamilton, and nine acres, nine roods, and eighteen perches, part of said lot.

The defendant Mary Anne Ramsay, as guardian, appeared for the defendant Samuel J. J. Ramsay, asserting title in him as tenant in common of the property with the plaintiff, and admitting the plaintiff's right to two equal undivided third shares thereof, but denying any actual ouster.

The defendants Mary Anne and Robert H. Ramsay appeared for the whole under the defendant Samuel, who was tenant in common with the plaintiff, admitting his right to two-thirds but denying actual ouster.

Mary Anne Ramsay, as guardian of Samuel J. J. Ramsay, by her notice, asserted title in him as devisee of John Ramsay.

The defendants Mary Anne and Robert Henry Ramsay, by their notice, claimed title in Samuel J. J. Ramsay as such devisee.

The plaintiff's notice of title was on a mortgage to him by the defendants Mary Anne, William, and Robert Ramsay, dated 8th December, 1862, and another mortgage to him by the defendants, dated 16th November, 1864.

The defendant William H. Ramsay died after the commencement of the suit, and before appearance.

At the trial, at Cobourg, before Adam Wilson, J., both mortgages were proved, also the will of John Ramsay, in these words: "I will and direct that my estate of which I may die possessed, shall be charged with and subject to the support and maintenance of my wife Mary Anne, during her natural life, or so long as she remains my widow; and in the event of her marriage, I do hereby will and direct that the provision in her favour shall thenceforth cease and be inoperative. Thirdly, I do give, devise, and bequeath unto my sons, William H., Robert H., and Samuel J. J., all the estate of which I may die possessed, both real and personal, after payment of my just and lawful debts, and subject to the devise hereinbefore contained in favour of my dear wife, to have and to hold the same unto my said sons, their heirs and assigns, for ever, share and share alike," subject further to the payment, &c., (giving to each of his daughters £50).

It was proved that the testator died in possession, about 1850, and that the defendant Samuel was about a year old at that time ; consequently he is still a minor.

This was the plaintiff's case.

A verdict was claimed for the defendant Samuel. The plaintiff urged that the infant must do some act independently of defending this suit to avoid the mortgage ; also that the widow took a life estate under the will, and that she and the defendant Robert had not proved they were in under the infant.

The learned Judge held that the widow did not take any legal estate, and that defending the ejectment was a good avoidance.

A verdict was directed for the defendants for one undivided third part, and that there was no actual ouster.

Leave was reserved to the plaintiff to move to enter a verdict for him as the Court might think fit.

Hector Cameron obtained a rule *nisi* accordingly, on all the points taken at the trial.

C. S. Patterson and *Spencer* shewed cause, citing *Grace v. Whitehead*, 7 Grant 591 ; *Doe Jackson v. Woodruffe*, 7 U. C. R. 332 ; *Doe Wilkes v. Babcock*, 1 C. P. 388 ; *Darcy v. White*, 24 U. C. R. 570.

Hector Cameron, contra, cited *Scouler v. Scouler*, 8 C. P. 9 ; *Doe Wills v. Roe*, 4 Dowl. 628 ; *Cole* on Ejectment 130 ; *Chambers* on Infants, 435 ; *Williams*, R. P. 123.

HAGARTY, J., delivered the judgment of the Court.

We agree with the learned Judge, that the widow did not take any legal estate in the land under the will. The case of *Scouler v. Scouler*, (8 C. P. 9), cited by Mr. Cameron, is very different.

We think the infant's deed was voidable, not void—*Mills v. Davis* (9 C. P. 510). It was urged on the argument that being only voidable, then, first, it could not be avoided during minority : secondly, that defending this ejectment was not a sufficient act of avoidance.

On the first point, it is said in *Co. Lit.* 380 b. "Matters *in fait* he shall avoid, either within age or at full age, as hath been said, but matters of record by him must be avoided during his minority."

In *Doe Jackson v. Woodruffe*, (7 U. C. R. 332), the late Sir John Robinson says, they consider that the deed made by the infant "was not absolutely void, but voidable by him either before he came of age or after: that he did avoid it most unequivocally when he brought this action to regain possession contrary to his deed."

In *Featherston v. McDonnell* (15 C. P. 164), the defendant in the ejectment had made a deed of the premises to the plaintiff's grantor. After coming of age he did nothing towards claiming the land for fourteen years. He then defended the ejectment, and the Court held that after such a lapse of time they would hold he had confirmed it before he defended the suit, and that having once so confirmed he could not by the defence avoid it.

In the well-known case of *Zouch v. Parsons* (3 Burr. 1808), it is said by Lord Mansfield, "So in the case of feoffments by an infant: he might enter during his minority to revest his possessory right, for the sake of the profits; but still the feoffment was voidable only, and he might elect to confirm it when he attained his full age." Again, p. 1804, "There is no difference in this respect, between a feoffment and deeds which convey an interest, the reason is the same." Again, p. 1808, "The reason why an infant cannot bring any writ analogous to a *dum fuit infra ætatem* during his minority, is, that his election may not be found by the judgment."

This writ is defined "A writ whereby one who had made a feoffment of his land while an infant, when he came of full age might recover those lands and tenements which were so aliened; and within age he might enter into the land, and take it back again, and by his entry he should be remitted to his ancestor's right." *Tomlins' Law Dictionary*, vol. i., and authorities there referred to, under the head "*Dum fuit infra ætatem*,"

So in *Com. Dig.*, Title *Enfant*, C. 5, "An infant, or his heir, may avoid his feoffment, &c., by entry, when the entry is not tolled." Again, C. 9, "If infant makes feoffment, or conveys by lease and release, and re-enters within age, still the feoffment or conveyance is only voidable, and he may elect to confirm it when of full age; therefore a stranger cannot avail himself of infant's entry, for he cannot elect for him"—citing *Zouch v. Parsons*, &c.

This last case is admitted to be good law by Lord St. Leonards in *Allen v. Allen* (4 Ir. Eq. Rep. 472).

In *Slator v. Brady*, (14 Ir. C. L. Rep. 66), the law is again reviewed. Fitzgerald, B., says, "An estate having passed under the voidable conveyance, and the grantee being in possession thereunder when the infant attained age, the estate could not, on principle, be divested but by some act of notoriety, as ejectment, entry, demand of possession, or the like; or, at the least, notice."

In *Grace v. Whitehead* (16 U. C. R. 50), the defence of infancy was allowed by an infant mortgagor in ejectment without question.

In *Slator v. Trimble* (14 Ir. C. L. R. 342,) it is held that an infant cannot *during minority*, avoid a lease, reserving rent to himself: *Woodfall*, L. & T., ed. 1867, p. 40, 41.

We cannot see on what principle an infant defendant may not (by guardian) defend an action for the purpose of raising the question of infancy, and thereby avoiding his deed. If, as Lord Mansfield says, the infant could enter during his minority to revest his possessory right, for the sake of the profits, after having conveyed away his estate, and let the grantee into possession, we are unable to understand why the infant may not also defend his possession for the sake of the profits, never having given it up. This leaves it apparently still in his power on coming of age to affirm his deed.

Having arrived at this conclusion, it would seem that the verdict cannot be disturbed.

No question was raised as to whether the conveyance was for the benefit or the disadvantage of the minor, supposing

such an enquiry allowable, as suggested in *Zouch v. Parsons*.

If, therefore, the defendant Samuel is entitled to a verdict for his undivided third, we cannot see how the plaintiff can recover against the other two, without proof of ouster. On the record they claim nothing as to the plaintiff's portion, and admit his right to the undivided two thirds.

In *Darcy v. White* (24 U. C. R. 573), Draper, C. J., says, "When there are two persons in possession, and both are sued, if the plaintiff fails in proving his case against one who defends, he cannot get possession against the other who does not appear to the writ. The judgment of the Court is suspended until the issue be tried, and if the defendant who appears is successful, it in effect enures to the benefit of the other."

Here the mother and Robert do not defend or appear for any interest in themselves, but only as being in as to the minor's one-third under him.

Rule discharged.

NICHOLSON V. PAGE.

Crown lands—Possession by purchaser before patent—Right to maintain trespass.

The plaintiff held possession of land as purchaser from the Crown under a receipt from the Crown Land Agent, and before defendant entered he had paid up in full, and was entitled to his patent, which however did not issue until some time after. *Held*, that he was entitled to recover against a wrong-doer for trespass committed before as well as after the patent.

Where the trespass had been wilful, and after full notice, the Court refused to grant a third trial, though they considered the verdict very high, and would have been much better satisfied with a much lower amount.

TRESPASS for breaking and entering the plaintiff's land and cutting down trees, &c.

ON the first trial the plaintiff proved an unexplained possession of the land, and a patent issuing to him therefor on the 31st January, 1867. The Court then held that

he could not recover for trespass to the lot prior to the patent. See *Nicholson v. Page*, ante p. 318.

At the last trial, at Peterborough, before Adam Wilson, J., he gave further evidence. He proved the receipt from the Crown Land Agent for purchase of the lot, his possession thereunder, that all the purchase money was paid, and that prior to the debtor's entry on his possession he was entitled on application to have his patent granted. It was still objected that his possession before the patent did not support the right claimed. The jury were directed to say what trespass was committed before and what after the patent, and they found for the plaintiff, \$563, made up as appears in the judgment.

Diamond obtained a rule *nisi* for a new trial, on the grounds that it was not shewn that there were any logs or timber cut after the patent was issued, and the plaintiff could maintain no action for any trespass committed before, and the learned Judge so directed the jury: that any trespass committed after the patent was only trifling in its character, and only nominal, if any, damages should have been given; and that there was no evidence connecting the defendant with the trespass complained of; or to reduce the verdict to \$75, or such other sum as the Court might think just, as the amount of damages for trespass committed after the date of the patent, pursuant to leave reserved.

He cited *Walker v. Rogers*, 12 C. P. 327; *Farquharson v. Knight*, 25 U. C. R. 417; *McMullen v. McDonell*, ante p. 36; *McLaren v. Rice*, 5 U. C. R. 151.

C. S. Patterson shewed cause, citing *Henderson v. McLean*, 8 C. P. 44; *Henderson v. McLean*, 16 U. C. R. 630.

HAGARTY, J. delivered the judgment of the Court.

In *Henderson v. McLean* (8. C. P. 44) it was held that the receipt for the purchase money from the Crown would of itself confer constructive possession. The plaintiff only proved an entry and no continuous or actual possession; and Draper, C. J., says, "In the absence of title there must be a possession in fact, upon which the wrongdoer trespasses,"—

and expresses a doubt whether, supposing the plaintiff might be treated as an intruder by the Queen, the plaintiff, though in actual possession, could maintain trespass, even against a wrongdoer—citing *Plowden*, 546. This decision was in Easter Term, 21 Vic.

In *Henderson v. McLean*, in a subsequent Term, (16 U. C. R. 630), this Court partly dissented from the Common Pleas. The plaintiff there had contracted to purchase the land from the Crown, but had not entered, nor had he a license of occupation. He had the lines run and posts planted, and the lands were well known as his, and he had on several occasions sent an agent to enter upon and examine them for him. This Court held he could maintain trespass against a wrongdoer, and that the clause in the Statute is altogether an enabling clause, and did not affect the position at common law of those purchasers of Crown lands who have entered and taken possession of lands with the knowledge and assent of the Crown; and that at common law the action was maintainable.

In the case before us there was a trespass by a wrongdoer on an actual possession, and on the state of the authorities we hold it sufficient to maintain trespass against a wrongdoer.

As to the merits. The second verdict is higher than the first. The jury were asked to sever the damages. They found

392 logs, at 70c., cut before patent issued	\$274 40
Damages done before that time	75 00
198 Logs after patent	138 60
Damages	75 00
	<hr/>
	\$563 00

There was evidence certainly that 590 logs were taken. Two witnesses said they counted 228 pine stumps, and at 3 logs to each this would make the number found by the jury.

The plaintiff claimed \$1.50 per log, the jury allowed 70c. There was evidence given of roads cut through the plain-

tift's land, and of brush thrown about and slashing done, basswood trees cut, and a shanty built therefrom; and that these trespasses were done with a high hand, after full notice by the plaintiff's agent of his title.

It is not easy to understand how the jury found how much damage was done after the issue of the patent.

The evidence was that the defendant's men worked all December and part of January, and came back in the Spring, rolled the logs into the lake, and took them off; some of the logs were then in the road allowance, and some on the lot, 70 and 80 yards from the water. In March and May they got some at least of the logs into the water.

In our view of the case we consider the plaintiff entitled to recover for all trespasses both before and after his patent issued. If, therefore, the evidence shews that the quantity of logs was actually taken, it matters but little whether they rightly apportioned the quantities. The damages, \$150, over and above the value of the timber itself, we can hardly pronounce excessive when the trespass was wilful, nor is the verdict moved against on that ground.

As to the sufficiency of the evidence to connect the defendant with the acts of the men, it is no doubt weak, but unless we be prepared to hold that the learned Judge should have nonsuited, we ought not to interfere on this ground. There was some evidence besides Horan's declarations. McDonald proved that defendant was lumbering in the neighbourhood, that the logs cut by Horan were marked "P. Co." (Page and Co.) and that he knew this mark of theirs.

The defendant could most readily on either trial have disproved his connection with Horan. He has not chosen so to do, nor has he filed any affidavit, as he might have done, denying such connection. He stands on his strict legal rights. As we think there was some (although not strong) evidence, we think we cannot interfere on this point.

We think the verdict very high, and would be much better satisfied with a much lower amount; but we do not feel

justified in sending the case down to a third trial—the defendant on each occasion offering no evidence to prove a lower value or a lesser quantity.

We are well aware of the very high-handed manner in which timber is frequently taken by wrongdoers, in defiance of the true owner, and in fact by sheer force in many cases. It is perhaps owing to the prevalence of such lawlessness that juries give high damages. Where the trespass was unintentional or caused by an honest mistake of the true boundary, a jury would hardly give damages beyond the actual value. We do not think we can interfere after these two trials.

Rule discharged.

HEANY V. PARKER.

Ejectment—Judgment and executions—Secondary evidence of.

Where the papers belonging to the District Court and to the Sheriff had been destroyed by fire: *Held*, in ejectment, that the defendant, claiming under a Sheriff's deed, might prove the judgment and executions by secondary evidence contained in the Sheriff's books, and in a fee book of the Court, and by the plaintiff's attorney in the judgment, whose papers had also been burned, and by the plaintiff; and that he was not bound to obtain exemplifications.

The plaintiff having slept upon his rights for nearly twenty years, and the jury having found for the defendant upon the secondary evidence of deeds and papers set out below, the Court refused to interfere.

Held, also, that the judgment creditor, the defendant's grantor, who had purchased under execution an undivided half, and claimed the whole under a deed from the plaintiff, was clearly a competent witness.

EJECTMENT for the east half of lot one, in the fourth concession of Verulam.

The plaintiff claimed the north half by deed from George Stewart, who was his grantee, the plaintiff being heir of the grantee of the Crown; and the south half by descent from his sister Sarah Ann Stewart, devisee of the patentee.

The defendant claimed by deed from John Knowlson to himself, and Knowlson claimed both by deed from the

plaintiff and by a Sheriff's deed of the plaintiff's interest under a *fi. fa.* lands, also by twenty years possession.

The trial took place before Adam Wilson, J., at Peterborough.

A patent was put in of the east half, dated 16th January, 1841, to Nicholas Heany, father of the plaintiff, his only son. Nicholas died many years ago; soon after the grant, having died in possession. Nicholas had a daughter, wife of George Stewart. The plaintiff lived there a year or so after his father's death. Stewart, the husband of the patentee's daughter, had got a deed of the land from the plaintiff fifteen years ago, and in May, 1867, reconveyed it to him in fee. His wife had died previously without issue living. There was some evidence that many years ago the plaintiff had rented the land to the defendant, who had been long in possession, giving him a sod and a twig as a kind of livery.

This was the plaintiff's case.

It was proved that many of the late Sheriff Conger's papers were destroyed by fire in 1858. Mr. Fortye, clerk of the Court, proved that all the Colborne District Court papers were destroyed by fire in 1857. A fee book was saved, of fees due to Government. In that book there was a fee for judgment entered, 5th September, 1846, in a suit of *Knowlson v. Heany*; the docket, *fi. fas.*, and all papers were burned, and this book was the only evidence in the office of this judgment.

Mr. Whitehead was mentioned as the plaintiff's attorney. His evidence was read by consent. He said he sent papers to enter judgment in a suit of *Knowlson v. Heany* (the plaintiff) on a cognovit, dated 23rd January, 1846, debt £14 4s., costs £2 2s. 6d. There was a *fi. fa.* issued, returned *nulla bona*, afterwards filed, and a *fi. fa.* lands issued on the 4th January, 1847, returnable on the 1st March, 1848, given to the Sheriff. He thought the Sheriff returned it, lands sold; had searched but could not find it. His office had also been burned.

This evidence was objected to as insufficient to prove matters of record.

The late Sheriff Conger's *fi. fa.* book was produced. A *fi. fa.* in *Knowlson v. Heany* was marked received 5th September, 1846, (giving the amount of debt and costs) returned no goods; also, *fi. fa.* lands entered received 6th January, 1847, returnable on the 1st of March term 1848; undivided-half of east half No. 1, 4th concession of Verulam, sold to John Knowlson, 31st January, 1848, for £24 6s. 2d. A search for papers was duly proved.

A deed was put in and proved, dated 2nd August, 1848, from Sheriff Conger to John Knowlson, setting out judgment and *fi. fa.* by Knowlson against the plaintiff Heany, and conveying the undivided half of the east half of lot one in the fourth concession of Verulam, containing fifty acres, more or less, sold on the 31st January, 1848.

Knowlson was examined on his *voir dire*, and afterwards in chief. He swore that the plaintiff owed him an account for goods, and he also had a claim against his father: that he made an arrangement with the plaintiff about the lands, and the plaintiff made a deed of it to him in 1847. He thought this deed had been lost eighteen or nineteen years ago, after being some time in his possession; he had searched for it, and it could not be found; the consideration was the amount of debt due; witness got the patent from a friend of plaintiff; at the time of sale he thought the plaintiff promised to have the patent sent to witness; the deed from the plaintiff was in the form of a quit claim; he bargained and sold all his right and claim to the land to witness and his heirs for ever: he thought there was a money consideration: he drew it from a form book: there were witnesses, could not say who they were; witness soon after arranged to sell the land to the defendant. He got the deed from the plaintiff before he got the deed from the Sheriff, nearly a year before; the deed from the plaintiff was not registered, he supposed from neglect. He understood from the plaintiff that he took an undivided half in the land under his father's will, also, that the will was bad, having only one witness. Witness was sure the deed was for the whole of the east half, and not only for the undivided half; he could

not explain how the Sheriff came to advertize only the undivided half, and to sell only that to witness; he told the plaintiff he did not want to keep the land. He sold to defendant for \$200. He gave the defendant an ordinary deed.

Mr. Dunsford proved he had this deed to defendant in his possession a year ago, receiving it from Knowlson; he had searched and could not find it; it had limited covenants. It was, he thought, for the undivided half of the east half.

It was proved that the defendant had been on the lot twenty-one years. He said he had rented it from the plaintiff.

It was objected, for the plaintiff, that the proof failed of any valid deed from the plaintiff to Knowlson, and that there was no proof of judgment recovered, or valid sale by the Sheriff, or of advertisements: that the deed was only for the undivided half.

The learned Judge considered the judgment, *fi. fas.*, and sale by the Sheriff, sufficiently proved.

Knowlson, who was allowed to be called back during the charge, explained that when he sold to defendant only the undivided half, it was because he had lost the deed from the plaintiff, and had only the Sheriff's deed, but he told this to the defendant, and they agreed to take the risk; he bargained, he said, with the defendant for the whole east half.

The case went to the jury on the facts, and they found for the defendant.

Hector Cameron obtained a rule *nisi* for a new trial on the law and evidence and weight of evidence, there being no sufficient evidence of any valid conveyance of the whole land ever executed by the plaintiff to Knowlson, and the deed from the Sheriff to Knowlson and from Knowlson to the defendant conveying only one half of the land; and for the improper admission of secondary evidence of the judgments and executions; and on the ground that Knowlson, being the person on whose behalf the suit was defended as

to one-half of the land at least, was not an admissible witness.

Boyd shewed cause, and cited *Ralston v. Hughson*, 17 C. P. 364; *Fields v. Livingston*, 17 C. P. 31; *Kemp v. Mathews*, 9 Ir. L. R. 405.

Hector Cameron, contra, cited *Hesketh v. Ward*, 17 C. P. 190; *Roe v. McNeill*, 13 C. P. 192; *Paterson v. Todd*, 24 U. C. R. 296.

HAGARTY, J., delivered the judgment of the Court.

As to the secondary evidence, we think the learned Judge was right. Conceding that matters of record, such as the judgment and writs here, should be ordinarily proved by exemplification, yet when the records themselves are proved to be wholly destroyed, it seems simply an impossibility to exemplify them. No doubt there are cases where the Court have ordered a record to be made up from the best materials available, to supply the place of one that was lost, but in the case before us there was nothing on which a record could be made up, and it could hardly be advisable to leave it wholly to the imagination of the Clerk of the Court to make up a record from an entry in a fee book.

Mr. *Taylor*, in his work on Evidence, 4th ed., section 496, says, "Parol testimony therefore can only be admitted on proof, first, that the public record or document has itself been lost or destroyed, for otherwise an examined copy might be obtained."

In *Thurston v. Slatford* (Salk. 284), Holt, C. J., said, "He remembered a case where the University of Oxford entitled themselves to a presentation by a conviction of the Earl of Shrewsbury for recusancy, and upon giving some evidence that the record was lost, the University was permitted to prove the effect of it by other evidence."

In *Roscoe* on Evidence, 10th ed., 93, it is said "Where an ancient record of judgment has been lost, it may be proved to the jury by parol or other testimony." See also *Macdougall v. Young* (R. & M. 392).

As to the objection to Knowlson as a witness. We do not see how the defendant could be deprived of his right to call him as a witness. There was no suggestion that Knowlson was defending the suit, and his interest would be mere matter of remark to the jury.

We see no misdirection on any of the points. Before the jury could find for defendant, they must have been satisfied that Knowlson was right in asserting that the plaintiff had conveyed the whole of the land to him, as if it were only the Sheriff's deed that the defendant had to rest upon, the plaintiff would have been entitled to a verdict for his undivided moiety, no actual ouster being denied.

It was a pure question of fact, depending wholly on the jury's view of the accuracy of Knowlson's memory and of his truthfulness. Merely reading the evidence as noted by the learned Judge, we might think it not unlikely that they would have decided against his statements. But the jury had the advantage of estimating the manner in which his testimony was given, and how he stood the test of rigid cross-examination.

We have consulted the learned Judge, and he appears to think the verdict right.

The plaintiff has chosen to sleep upon his rights for nearly twenty years, and to allow the land to be cleared and improved. His case has been fairly submitted to a jury, and we do not feel warranted in interfering with their decision.

Rule discharged.

STRATTON V. CHAFFEY ET AL.

Navigation—Collision—Proof of negligence—27-28 Vic. ch. 13 sec. 5, Arts. 16, 19.

Plaintiff sued defendants for running down his schooner while at anchor, by their steam tug with a raft in tow. It appeared that the schooner while approaching Presqu'isle harbor, which has a narrow channel, in a heavy sea and wind, became unmanageable, and grounded on the north side of the channel, the wind being southerly. Defendants' tug, with the raft in tow, followed soon after, keeping as near the south side of the channel as she could, and going at a fair rate of speed, but the raft was driven against and sunk the schooner, the captain of the tug not knowing that it was aground. The tug could not have stopped without risking the loss of the raft, and it was alleged that the tow rope could not have been shortened, or speed slackened.

Plaintiff contended that defendants were liable, having violated article 16 of sec. 2 of the Navigation Act, 27-28 Vic. ch. 13, which enacts that every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed; but,

Held, that it was a case within article 19, which directs that in obeying the rules regard shall be had to all dangers of navigation, and to any special circumstances rendering a deviation from them necessary to avoid immediate danger: that it was a question for the jury, under all the circumstances, whether defendants had been guilty of negligence, and that the evidence warranted a verdict in their favor.

ACTION for running down and sinking the plaintiff's schooner, while at anchor and aground near the channel of Presqu'isle Harbor, by defendants' steam tug with a raft in tow. Pleas, not guilty, &c,

The case was tried before Richards, C. J., at the last Courthouse Assizes, when a verdict was rendered for the defendants.

The main facts, as they appeared in evidence, were these: In August last the plaintiff's schooner was making the harbor of Presqu'isle. It was blowing hard and a heavy sea outside; she was laden with lumber, had a good deal of water in the hold, and was unmanageable. At the entrance of the harbor she missed stays, and she took the ground and her anchor was let go. This was on the north side of the channel, about sixty or seventy feet north of a white buoy indicating the channel. The wind was blowing from S.S.W. The harbor lies east and west, the entrance from the east. The defendants' tug, with a raft in tow, about 1400 feet

long, the tow rope being about 1250 feet, came into the harbor shortly after the schooner took the ground, going at a fair rate of speed, and as far to the south of the buoy as the schooner was to the north of it. The channel is narrow, and while coming in the middle of the raft struck the schooner in the bow, stove two holes in her, and she filled with water and sank, the tug herself passing within 120 feet of the schooner.

The captain of the tug stated he was not aware that the schooner was aground until he came up to her : that he kept as far as possible to the south of the channel, keeping the lead going, and was in eleven feet water, the tug drawing over nine ; that the foreman of the raft objected to his shortening the tow line, as in doing so they would go ashore. Outside, the captain said, they could not shorten, as the sea was too high. The captain proposed shortening, but the foreman objected, and the foreman said the tug was under his orders. The captain said he could not have shortened the line with safety, and that doing so would not have prevented the collision. The wind and heavy sea drove the raft towards the north side of the channel.

The raft was valued at \$40,000, the schooner at \$700 or \$800. There was contradictory evidence as to what ought to have been done, and as to the way in which the raft might have been brought into the harbor—the shortening of the line—going slow—and as to anchoring. The raft on account of the heavy sea was going to pieces, and did lose a large number of pieces of timber.

At the end of the case the plaintiff's counsel contended that, as the defendants' vessel did not slacken speed as she approached the schooner, the defendants were responsible. The learned Chief Justice did not concur in that view, saying, that the question was one for the jury, whether there was negligence on the part of those navigating the tug ; and in his charge to the jury he left it to them to say whether it was reasonable they should have slackened speed in view of the circumstances in which the defendants' vessel was placed, with a valuable raft in tow, which might be

destroyed by doing so : that slackening speed under such circumstances became a question of negligence or no negligence.

To this part of the charge the plaintiff's counsel objected, for leaving the question to the jury to say if there was negligence. The learned Chief Justice brought under the notice of the jury the questions as to shortening the line and anchoring, telling them that they were to consider the facts and circumstances as they existed at the time of the collision, and say whether the defendants, by their servants were guilty of negligence ; saying to them that the plaintiff must shew negligence, and if it was doubtful whether there was negligence or want of reasonable skill in the management of the tug, to find for the defendants.

In Michaelmas term last, *J. H. Cameron*, Q. C., obtained a rule *nisi* calling on the defendants to shew cause why the verdict should not be set aside, on the ground that the verdict was contrary to law and evidence ; that the learned Chief Justice mis-directed the jury in stating that the provisions of the 27-28 Vic. ch. 13, articles 15, 16, and 17 did not apply to the case, and that the owners of the tug were not responsible, although the captain did not act upon his own judgment, but on the judgment of the owners of the raft, and that the captain had the right to take the raft up the harbour, even although it might inevitably cause the loss of the schooner.

During the same term *McDonnell* shewed cause ; and during last term *J. H. Cameron*, Q. C., supported the rule.

MORRISON J. delivered the judgment of the Court.

We are of opinion that this rule must be discharged.

It was pressed by the plaintiff's counsel that the defendants' vessel violated articles 15, 16 and 17 of the 2nd sec. of the Navigation Act, 27-28 Vic. ch. 13.

Article 15 enacts that "if two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship."

Art. 16, "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse," &c.; and Art. 17—"Every vessel overtaking any other vessel shall keep out of the way of the said last mentioned vessel."

Violation of Article 16 was the ground more particularly relied on, and the plaintiff contended that the learned Chief Justice should have so ruled, and told the jury that in that respect the defendants were guilty of negligence.

Assuming that the defendants' vessel infringed article 16, or any of these articles, which we are not prepared to say she did, still, by article 19, "In obeying and construing these rules due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger."

In the present case both vessels were approaching Presqu'isle harbor, which has a narrow channel, in a heavy sea, and blowing hard. The plaintiff's vessel is unfortunately unmanageable, and she misses stays whilst she is going in, and goes aground on the north side of the channel, the wind southerly. The defendants' vessel with the raft in tow follows shortly after, keeping as close to the south side of the channel as the depth of water would permit, and going at a fair rate of speed passes the schooner at the utmost distance she could; but the raft, driven no doubt by the wind and sea, comes in contact with the schooner and she is sunk. There was evidence shewing that the raft, from the heavy sea, was in danger of going to pieces, and in fact did lose a number of pieces of timber, and that it was impossible to stop without losing the raft.

All these circumstances, as well as the length of the tow rope, the necessity or possibility of shortening it, the slackening speed or stopping, were all matters for the consideration of the jury in determining whether there was negligence or unskilfulness on the part of the defendants' servants. As the learned Chief Justice told the jury, it was for the plaintiff to shew negligence.

One cannot read the evidence given at the trial without seeing that the accident is attributable to the unfortunate position in which the plaintiff's schooner was placed just as the defendants' vessel was entering the harbor, the captain of the latter not being aware that the schooner was aground. The defendants' tug had either to stop, at the risk of going ashore and losing the valuable raft, or to enter the harbor carefully and skilfully, doing their utmost to avoid collision, and it was for the jury to say whether they were satisfied they did the latter. It is just one of those cases the 19th article was intended to meet.

The plaintiff relied principally upon not slackening speed when approaching and passing the schooner as negligence, but it appears to us from the evidence, as well as the reason of the thing, that doing so would have inevitably resulted in collision and perhaps the destruction of the raft.

As to that part of the rule which refers to the captain of the tug not acting on his own judgment in regard to shortening the tow line, nothing appears on the Chief Justice's notes shewing that any objection was taken or any ruling on the point; but be that as it may, we do not think in this case it forms any ground for a new trial. The captain states in his evidence that he conversed with the foreman of the raft about shortening the line, and that the foreman objected to his doing so; but the captain further states that outside of the harbor he could not have shortened, as the sea was too heavy, and the raft would have been smashed to pieces, and if he had shortened after getting in the harbor he could not have avoided collision. The mate swears he spoke to the captain about shortening, and that he said no. It is true that Brady, the foreman of the raft, objected that shortening would endanger the safety of the raft, but we cannot say that the captain did not act on his own judgment nevertheless.

On the whole we are of opinion that the case was properly left to the jury, and we see no reason for interfering with their finding.

Rule discharged.

GRIGGS V. BILLINGTON.

Agreement to hire—Termination by notice—Agreement to refer disputes—Construction.

The defendant hired the plaintiff to make for him certain machines and superintend their use in his manufactory for a term of five years, unless before terminated as thereafter provided; and in case of failure of the plaintiff to perform fully the agreement it might be terminated, at defendant's option, by giving written notice to that effect, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final.

To an action by the plaintiff for wrongful dismissal, the defendant pleaded termination by him of the agreement by written notice, because of the plaintiff's failure to perform it in certain particulars specified.

Held, 1. That defendant was bound to establish the ground mentioned in his notice for terminating his agreement.

2. That the agreement to refer being collateral, and not a condition precedent to the plaintiff's right to sue, could not bar the action.

DECLARATION. That the defendant by his deed, dated 16th January, 1865, covenanted with the plaintiff that he, the defendant, would well and truly carry out a certain contract theretofore entered into between the firm of Billington & Forsyth of the first part, and the plaintiff of the second part, and would pay and discharge all sum or sums of money then due, or which might thereafter become due or owing to the plaintiff thereunder, which said contract was a deed in the words and figures following, that is to say:—"Whereas Billington and Forsyth, of Dundas, in the Province of Canada, are desirous of establishing and carrying on the business of manufacturing wood screws, or screws commonly used in wood, and of securing the services of a competent person to take charge of and to construct the machines ordinarily used in the manufacture of such screws, and also to superintend the manufacture of such screws: Now therefore this agreement, made the 18th of April, 1864, by and between the said firm of the first part and Ira Griggs of the second part, witnesseth, the said party of the first part hereby agrees to and does hire and employ the said party of the

second part to take charge of the construction and to construct at Dundas, in Canada West, the machines usually employed in the manufacture of such wood screws, or screws commonly used in wood, which machines are known as headers, turners' or shavers' nickers, and threaders, Said party of the first part agrees to furnish all the material and all the help necessary and proper for the constructing of such machines, at their own proper cost, and said party of the second part is to oversee and construct the same, and devote his entire time and skill and experience to the proper construction of the same. The construction of such machines as aforesaid is to continue so long as said party of the first part shall desire, but not to exceed five years, and after so many of such machines shall have been constructed as the party of the first part shall deem sufficient, the said Griggs shall be employed, and said party of the first part doth hereby hire and employ him, to superintend the manufacture or to engage in manufacturing such wood screws, upon said machines or others, or in the manufacture of similar machines, during the remainder of the period of five years, as hereinafter expressed. And said party of the first part hereby agrees to employ said party of the second part as above for and during the period of five years from the commencement of said work by said Griggs, at Dundas, unless before terminated as hereinafter provided, and to pay him for the full and faithful performance of the services in this agreement expressed, at and after the rate of \$1500 per annum, for all the time of his actual service, payable monthly. And said party of the second part hereby accepts the same to be in full compensation for his services under this agreement. And said party of the second part hereby agrees to proceed at once to Dundas, in said Province of Canada, and to commence immediately the construction of the machines hereinbefore mentioned, to take entire charge of the construction of the same, and so many thereof as the party of the first part may designate, to prosecute the work upon the same as rapidly as practicable,—said party

of the first part furnishing the material and labour for the same. And said party of the second part hereby declares his ability fully and completely to construct such machines in the best manner, and agrees to give and devote his entire time, skill, and experience, to the proper construction thereof; and he further agrees to supply the working drawings of the said machines, and to build and construct the same in a complete and perfect manner, and to make the same equal in every respect to any of those now in use by the American Screw Company of Providence, in the State of Rhode Island. And said party of the second part further agrees that when a sufficient number of such machines shall have been manufactured (the same to be determined by the party of the first part), then that he will devote his time and skill to the superintending or manufacturing of such wood screws upon said machines, or such other as the party of the first part may designate, or to the manufacture of machines, or in or about the said business of wood screws, or machines for their manufacture, as the party of the first part may direct, during the remainder of the period of five years, as hereinbefore limited. And said party of the second part agrees to devote his entire time and skill to the successful prosecution of the enterprise and business herein designated, and to use all his efforts to advance and promote the welfare of his said employers, Billington & Forsyth, in their said business. In case of the failure of the said party of the second part to perform fully this agreement on his part, then this agreement may be terminated at the option of the party of the first part by giving written notice to that effect, and said party of the second part shall be responsible in damages to the party of the first part for such failure to perform. And it is further agreed between the parties to these presents, that in case any dispute or controversy shall arise between them as to the sufficiency or practicability of any such machines so to be constructed, or as to the full and faithful performance of this agreement by said party of the second part, that the same shall be referred to three

disinterested persons, who shall be skillful practical men, understanding such machines, to arbitrate and award between said parties; such arbitrators shall be chosen one by each of the parties hereto, and the third by the two arbitrators so selected; the decision of the majority of such arbitrators shall stand as the decision of the whole, and shall be final and conclusive between the parties hereto. In witness whereof," &c.

And the plaintiff avers that all conditions and things have been performed, and all time has elapsed, entitling the plaintiff to receive payment of the three monthly instalments of his salary, which became due and payable next before the commencement of this suit, and that he has always been ready and willing to perform the said agreement on his part, yet the defendant has not paid the said three instalments, or any part thereof, to the plaintiff.

Second count. That the defendant by his deed covenanted with the plaintiff in manner and form and to the effect in the first count mentioned, and the plaintiff continued in the employ of the defendant under the said covenant for a length of time, and the plaintiff has always been ready and willing to remain and continue in the employ of the defendant, and upon the terms of the said agreement, yet the defendant did not nor would continue the plaintiff in his employ until the expiration of the said period of five years, but, on the contrary, refused to suffer the plaintiff to continue in the defendant's employ under the said agreement, and wrongfully discharged him therefrom without any reasonable or probable cause, and still refuses so to do, whereby the plaintiff has lost the wages, profit, and advantages which he otherwise would have acquired, and has been wholly unemployed ever since he was so discharged as aforesaid.

The third plea is the only one requiring notice. It was that defendant terminated the agreement by giving the plaintiff a written notice to that effect, because of the failure of the plaintiff to perform fully the agreement on his part, in failing to make the said machines equal to any

of those at the time of the making of the said agreement in use by the American Screw Company of Providence, in the State of Rhode Island, and in failing to devote his entire time and skill to the successful prosecution of the enterprise and business, but, on the contrary, becoming idle, intemperate, and inattentive to the said business, which is the alleged wrong. Issue.

The case was tried at Hamilton, before Morrison, J.

It was contended by defendant that he had the right to determine the agreement by giving the notice mentioned in the third plea, and that he was not bound to establish that the cause mentioned in the notice for terminating really existed.

The learned Judge held otherwise, and a great deal of evidence was heard on the question. Leave was reserved to move for a nonsuit on this.

The plaintiff had a verdict for \$500.

M. C. Cameron, Q. C., obtained a rule on the leave reserved, and on the law and evidence, and for misdirection in the ruling.

He argued for defendant that notice having been given under the agreement, it was a question to be decided by arbitration whether the cause assigned existed or not.

Freeman, Q. C., shewed cause, and cited *Avery v. Scott*, 8 Ex. 487; *Scott v. Avery*, 5 H. L. Cas. 811; *Horton v. Sayer*, 4 H. & N. 642; *Braunstein v. Accidental Death Assurance Co.*, 1 B. & S. 782; *Hemans v. Picciotto*, 1 C. B. N. S. 646.

HAGARTY, J., delivered the judgment of the Court.

The well-known rule, that no agreement between parties can oust the jurisdiction of the Court, has been much modified by the decisions following *Scott v. Avery*, (5 H. L. Cas. 811), reversing *Avery v. Scott* (8 Ex. 487). That and the subsequent cases establish the rule, that if the settlement of a claim by arbitration is made a condition precedent to the bringing an action that mode must be first resorted to.

Here the cause of action is for an alleged wrongful dismissal. Defendant says he put an end to the agreement by giving notice to that effect, assigning certain reasons. The agreement says, "In case of failure of the plaintiff to perform fully this agreement, then it may be determined at the option of the defendant by giving written notice to that effect."

Now this clause, standing alone, does not, in our opinion, permit the termination of the agreement at defendant's option, and without his having to shew any reason. The option is only to be exercised "in case of failure of the plaintiff to perform fully the agreement." The alleged failure must therefore be a matter to be proved if desired.

Then, unless the agreement provides for a settlement of any dispute as to such failure by arbitration or otherwise, as a condition precedent to the plaintiff having a right to enforce any claim, of course the Court's right cannot be ousted. Then comes the provision, that in case any dispute arise as to the sufficiency of the machines to be constructed, or as to the full and faithful performance of the agreement by the plaintiff, the same shall be referred to arbitrators, their decision to be final and conclusive.

In the last case that we have seen, *Elliott v. Royal Exchange Assurance Company* (L. R. 2 Ex. 243), Kelly, C.B., says: "The fair result of the authorities is, that if the contract is in such terms that a reference to a third person, or to a Board of Directors, is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay for the loss (or other matter in question), with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the Courts, or deprive the party of his action."

In the present case, there cannot be said to be any conditions precedent, express or implied, on the plaintiff's right to sue for wrongful dismissal, if on any alleged failure on

his part to perform the agreement the defendants should elect to put an end to the contract. There is, at most, only a collateral agreement to settle any dispute that may arise by reference to arbitration: in other words, the plaintiff makes a claim for damages for wrongful dismissal; unless his claim does not arise till its existence or amount be first determined by the reference, then the contract to refer can hardly be said to be otherwise than distinct and collateral, or to be a condition precedent.

We refer to *Horton v. Sayer* (4 H. & N. 642); *Braunstein v. Accidental Death Assurance Co.* (1 B. & S. 782).

But we find no plea on the record raising this question as to arbitration, nor was any such plea asked to be added. The case was argued in Term as if the pleadings did raise the point.

We have considered it as if the point were raised, and our opinion is against the defendant.

Rule discharged.

THE COMMERCIAL BANK OF CANADA V. WILLIAM R.
HARRIS AND THOMAS D. HARRIS.

Promissory notes—Set-off—Issue taken on bad plea—Practice.

To an action on promissory notes against maker and indorser, the latter pleaded a set-off in the common form, for work done by him for the plaintiffs—a plea held bad on demurrer in *Hughes v. Snure*, 22 U. C. R. 597. The plaintiffs however did not demur, but took issue, and on the trial the jury found the plea proved. A verdict having been directed for the plaintiffs, with leave to move to reduce it by the amount of set-off proved, a rule was obtained by the defendants on this leave, and a cross rule by the plaintiffs for a new trial on the evidence.

The Court made the latter rule absolute, but on payment of costs by the plaintiffs, as the whole difficulty had been caused by their going to trial on an insufficient plea.

Semble, that if the evidence had supported the plea, the rule to reduce would have been made absolute, and the plaintiffs allowed to move for judgment *non obstante*—following *Lumby v. Allday*, 1 C. & J. 301.

THE declaration was on several promissory notes made

by the first and endorsed by the second defendant, amounting to about \$10,000.

Plea, by the defendant Thomas D. Harris, a set-off in the common form, for work done, &c., by him for the plaintiffs.

There were other pleas which need not be noticed.

The case was tried at Brampton, before Gwynne, Q. C.

The notes were admitted on the record, and the defendants began.

The maker, W. R. Harris, was called as a witness for his father, the endorser. The whole question on which anything turned was as to the set-off claimed by the endorser.

It appeared that for many years he was a customer of the plaintiffs' Bank. The latter had a demand of about £2000, against one Crocker, who had gone to Australia, and which they considered at best very doubtful. The son swore that in 1856 they had a claim against Crocker which they succeeded in collecting; that his father offered to collect the Bank claim on the terms of receiving one-half of the amount collected, on getting the proper papers from the Bank. Mr. Campbell, the Bank agent, came to the defendants' office and brought the papers, and then offered the Crocker claim to T. D. Harris, for £1200, taking his note therefor at one year. Harris declared that he would adhere to his first offer: namely, to receive half what he should collect. Campbell then laid the papers down and said: "There they are; take them on your own terms, and do the best you can for the Bank." Witness swore that was the distinct understanding. Witness said he had not heard their first arrangement; he had heard of it from his father. On the cross-examination, it did not appear clearly that he heard it said between Campbell and his father that the latter was to have half.

In 1857 the whole amount of the claim was recovered in Australia from Crocker, through the agents selected by the defendant, and the plaintiffs received it, about £2,400.

A letter was put in from the plaintiffs to the defendant, dated March 28th, 1857, acknowledging the receipt of the claim from Australia, thanking him for his information

and correspondence, and enclosing draft for £250, of which they begged his acceptance.

A letter was produced from the defendant, of the same date, to Mr. Campbell, acknowledging the receipt of £250, and asking if that amount at all concurred with the understanding the defendant had with him, and whether his acceptance of that sum debarred him of his right to the original understanding.

Also a letter of the same date from Campbell, asking him to state what the understanding was, as he had no recollection except of offering to sell it and take the defendant's note in payment.

On the 31st of March, 1857, the defendant wrote to Campbell, stating his claim to one-half, in substance detailing the matter as his son swore at the trial.

On the 2nd of April, Campbell wrote to him wholly denying any such arrangement.

The defendant retained the £250, and nothing more was said about any further claim for many years.

The witness said his father did not press his claim, as he feared the Bank would close his account, and he was in their debt. There was no entry whatever in the defendant's books of any claim against the Bank. The witness said he looked on it as a debt of honor. Afterwards, on re-examination, he said he considered the Bank legally bound to pay. He said, in 1864 it would have been an important object to have the Bank claim reduced to \$5000; it would have enabled the witness to have continued his business.

In 1864, seven years after this, the defendant T. D. Harris gave a mortgage to the Bank, reciting that he owed them over \$11,000, set out in a list of bills and notes attached, and in 1865 another instrument was executed reciting the mortgage, and that the debt was reduced or to be reduced to \$10,000. This was the amount now in suit.

Mr. Campbell was called by the plaintiffs. He directly denied making any agreement to give half the amount recovered against Crockert to the defendant; he made the offer to

sell the claim to the defendant, as already mentioned. He said that since April, 1857, the defendant never made any further claim as to the Crocker matter; never spoke of it; when the settlement was made in 1864 and 1865, nothing was said about it.

The learned Judge charged the jury that there ought to be a verdict for the plaintiffs: that as to the plea of set-off there was no evidence of anything which could be the subject of set-off in this action: that the only matter that could be set off would be a claim which in its nature or circumstances arose out of or was connected with the notes sued on, or the consideration thereof. But to save expense, in case the Court should think otherwise, the jury were asked to find: 1st. Did the Bank, through Campbell, agree to give the defendant one-half the amount collected from Crocker for his services in collecting the debt. 2nd. Did he accept the \$1,000 in full therefor. This charge was objected to by the defendants.

The jury answered the first question in the affirmative, the second in the negative.

Leave was reserved to the defendants to reduce the verdict by the sum of \$6810, if the Court should be of opinion that the defendant T. D. Harris was on this evidence entitled to have his set-off allowed in this action; and a verdict was rendered for the plaintiffs, \$10,950.

McKenzie, Q. C., moved accordingly on the leave reserved, and for misdirection as to the set-off.

Crooks, Q. C., obtained a cross rule, in case the Court should be of opinion that the verdict should be reduced, for a new trial, on the law and evidence and weight of evidence.

Both rules were argued together.

HAGARTY, J., delivered the judgment of the Court.

It was not pretended that this set-off of the defendant T. D. Harris was a matter in any way connected with or arose out of the notes sued on. Mr. McKenzie, however, contended strenuously, that as the plea was pleaded and not demurred to, but issue taken upon it, the plaintiffs had

rested their case simply on its truth or falsehood, and could not now be heard urging this objection.

The provision in the Statute (Consol. Stat. U. C. ch. 42, sec. 32), is. "In such action any person sued may set off against the plaintiff any payment, claim or demand, whether joint or several, which in its nature and circumstances arises out of or is connected with the bill or promissory note that forms the subject of such joint action, or the consideration thereof."

In *Hughes v. Snure et al.* (22 U. C. R. 597), (maker and endorser), a plea of set-off by each defendant like that before us was demurred to, as not shewing that the set-off arose out of or was connected with the note sued upon, and the plea was held bad on this ground; and the learned Chief Justice of this Court points out the wisdom of the limitation imposed by the Statute. "If the plaintiff sue the maker and endorser he cannot join in such suit a demand against either for goods sold, &c., to the one. But if they can set off each a several demand against him, then, although he may have a demand against each separately, of even a greater amount, he cannot avail himself of it."

We have therefore here a matter offered in bar *pro tanto* of this action, which it has been decided cannot be allowed, and is not a legal bar. The plea here would have been demurrable, on the authority of the case cited. Do the plaintiffs by not demurring, but taking issue, make its subject matter a good bar, notwithstanding the Statute? This is the proposition that the defendant presses us to decide in his favour.

We do not see how the omitting to object to the want of an averment sufficient to bring the defendant's pleading within the Statute, waives the necessity at the trial of proving, as a matter of fact, such matter as would make it a valid defence in this action.

If the plea had stated that the set-off was for matter arising out of the notes sued on or their consideration, and the plaintiff had simply traversed the plea, the defendant must have proved such matter.

It seems unreasonable that he should be in a better position at the trial in consequence of his own error in pleading a bad plea.

But the case of *Lumby v. Allday* (1 C. & J. 301), which appears to be still law, creates difficulty. To a declaration in slander, which really disclosed no cause of action, the defendant pleaded not guilty, instead of demurring. At the trial the plaintiff had a verdict, with leave to move to enter a nonsuit on this objection to the declaration. Next Term the rule was discharged. Bayley, B., says, "The rule is, that if the facts alleged in the declaration be proved, it is the duty of the jury to find for the plaintiff; and if those facts do not disclose a sufficient cause of action, the defendants must move in arrest of judgment. * * The duty of the Judge, under whose direction the jury try questions of fact, is not to consider whether the facts charged give a ground of action, but to assist the jury in matters of law, which may arise upon the trial of these facts. * * The proper mode to bring that legal effect into consideration is, before trial, to demur; after trial, to move in arrest of judgment."

The Court discharged the rule for nonsuit, and notwithstanding the lapse of time (the motion for nonsuit was in Michaelmas, judgment in Hilary), directed a rule *nisi* to arrest the judgment.

According to *Hughes v. Snure*, this plea was bad on demurrer. The plaintiffs have chosen not to demur but to take issue, and then arises the difficulty like that in *Lumby v. Allday*. We cannot see how to distinguish this case from that, and the result apparently is, that the jury should try the truth of the defendants' plea of set-off, although the matter of it cannot be legally available as such. But for the case *Hughes v. Snure*, we should have thought that perhaps the common form of plea of set-off would suffice, leaving it a matter of evidence at the trial whether the nature of the defendants' claim brought it within the Statute.

If we follow *Lumby v. Allday* we should make the rule

absolute to reduce the verdict by the amount found, giving the plaintiffs leave (as was done there) to take a rule *nisi* for judgment *non obstante veredicto* on the plea.

But we find it impossible to uphold the verdict of the jury on the weight of evidence, and think the case must be submitted to another jury. The state of facts disclosed seems wholly inconsistent with the existence of this demand of the defendant as a *bond fide* claim. \$1000 was retained by the defendant in 1857, after learning that the plaintiffs did not recognize any such claim as he advanced to half the proceeds of the Crocker debt. In 1864, when apparently in pecuniary straits, and compelled to give security on real estate, he gives such security, acknowledging being indebted to the whole amount claimed, and saying nothing whatever of this large demand, which if true would have reduced the Bank claim by nearly one-half. Again, in 1865, we find him readmitting the amount due, and not falling back on the old claim till this action was brought, between ten and eleven years after a right had (as the defendant now wishes us to believe), accrued to him to demand some five or six thousand dollars from the plaintiffs.

We therefore direct a new trial. If there had been no difficulty as to the pleading, we should on such evidence have directed the costs to abide the event. But as the whole difficulty has been caused by the plaintiffs going down to trial on an insufficient plea, we direct the new trial to be on payment of costs by the plaintiffs.

All parties may now consider whether, if the record go down to trial again, it should remain in its present position.

As to the effect of the insufficient pleading after verdict, and what is cured thereby, see *Lord Delamere v. The Queen* (L. R. 2 H. L. 419).

Rule absolute for new trial.

THE CORPORATION OF THE COUNTY OF HURON V.
ARMSTRONG.

*Action against surety—Plea, non execution by other intended sureties—
Demurrer—Non est factum.*

Declaration on a covenant by defendant as surety for the payment of rent by one B. *Plea*, on equitable grounds, that defendant executed on the understanding and representation that Y., K., and E. should also execute, and that he should be responsible with them and not solely; and that it was represented to him by B. and by the said K. that immediately after defendant's execution the other three would execute. It was then alleged that they never did execute, and that before any breach, and with all due diligence, he gave notice to the plaintiffs of the premises, and that he claimed to have been released by such non-execution.

Held, on demurrer, that the plea was bad, for there was nothing to connect the plaintiffs with the representations on which defendant executed, and they might have leased to B. on the understanding only that defendant should be surety.

The evidence however supplied this defect, shewing that the representations were made by plaintiffs' agent when he obtained defendant's signature; and there was also on the record a plea of *non est factum*.

Held, that the defence was admissible under this plea, as shewing in substance that defendant executed the deed conditionally only, and as an escrow.

Defendants were also allowed to amend the equitable plea in accordance with the evidence, on payment of costs.

THE declaration charged that that by deed, dated the 20th December, 1866, between the plaintiffs of the first part, one Bennett of the second part, and defendant of the third part, plaintiffs let a certain toll-gate to Bennett, and the tolls, from the 1st of January, 1867, to the 1st of January, 1868, at a named rent, and Bennett thereby covenanted to pay the rent, and defendant by said deed covenanted with the plaintiffs that if Bennett did not keep his covenants, he, defendant, would pay the rent, &c. It was then alleged that Bennett made default, and that neither he nor defendant had paid, &c.

Pleas—1. *Non est factum*. 2. On equitable grounds, that the defendant executed the said bond on the understanding and representation that the same should be executed also by one William Young, one J. W. Kerr, and one William Elliott, and that he, the defendant, should be responsible together with the said W. Y., J. W. K., and

W. E., and that he should not be solely liable ; and that it was represented to him by the said Bennett and by the said J. W. Kerr, that immediately after the said bond had been executed by him, the defendant, the said other persons, W. Y., J. W. K., and W. E., who had been named to him, this defendant, as his co-sureties, would also execute the said bond ; and that the parties to the said bond of the third part would be this defendant, the said W. Y., J. W. K., and W. E. And the defendant says, that after he had executed the said bond on his part, the same remained in that state, and never was executed by the said Y., K., and E., or either of them. And the defendant says that the said bond never having been executed by the said other parties as aforesaid, and he not having the rights against the others as co-sureties jointly with himself to which rights he was entitled, the said bond should be regarded as incomplete, and he ought not now to be called upon to fulfil the same. And the defendant further says, that before any breach of the condition of the said bond, and with all due diligence, he caused notice of the premises, and that he claimed that he was not bound by the said bond, and that he claimed to have been released by the non-execution by the said other parties, to be given to the said plaintiffs.

Demurrer—That the plea amounts to *non est factum* ; that it does not connect the plaintiffs with any representation ; and other objections.

The plaintiffs joined in demurrer, and took issue on this plea, and the case was tried before Richards, C. J., at Goderich.

One Kerr, the subscribing witness, swore he saw defendant execute the deed produced : he put his mark to it ; the County Engineer, Bays, gave him the papers ; he thought the filling up of defendant's name was in Bays' writing. Elliott, Young, defendant, Anderson, and witness, had signed a recommendation that Bennett should get the gate ; witness did not understand that he (witness) was to become surety ; defendant and the others said they were to be sureties. The Engineer had left the paper with

witness to get Young and Elliott to sign it; Bennett had signed. Witness read it over to defendant, stating its substance, telling him the others were to sign it, and on that understanding he signed it. Witness had hopes the others would sign; he then had not seen the others. About a week after, he saw them, and they refused. He told Bays the others would not sign, and that defendant had signed on the understanding that the others would sign; he thought Bays told him he had looked for Elliott but could not see him; the others said Bennett had told them not to sign.

Bays, the Engineer, swore he had filled in the deed at the Council meeting in December, 1866, filling in defendant's name at Bennett's instance; there were four men named as sureties in a paper they had; witness wanted to get one or two of the best of them to sign; he went to Young, who refused; he tried to see Elliott, but failed; Bennett told him to leave the paper at Kerr's office, as he would get defendant to sign; he took it to Kerr about the 10th or 12th of January; Bennett also said Kerr would try to get Elliott's signature, and he made sure of getting defendant; nothing was said about the plaintiffs' refusing to accept if Elliott's signature was not obtained; no instructions were given about it. Witness got it from Kerr two or three weeks after he said the others would not sign; Kerr was told to put in Elliott's name if he would sign; Bennett was in default about three months after he got the gate.

Defendant acknowledged his signature.

This witness being recalled, said when Kerr gave back the deed he did not say defendant signed it on the understanding that the others were to sign; nothing was said about it.

The learned Chief Justice left it to the jury as a question of fact, whether it was understood at the time that defendant executed that it was to be executed by the other two sureties; if so, did Kerr inform the officer of the plaintiffs that the instrument was executed by defendant under the understanding, that it was to be executed by the

other two sureties. He did not think the evidence would support the plea of *non est factum*, and directed a verdict for the plaintiffs thereon.

The jury found for defendant on the equitable plea, and leave was reserved to move to enter a verdict for defendant on *non est factum* also.

Hector Cameron obtained a rule *nisi* to enter a verdict for defendant on the plea of *non est factum*, on the leave reserved; and the demurrer and rule were argued together.

C. Robinson, Q.C., shewed cause.

Hector Cameron, for the defendant, cited, as to the demurrer, *Stor. Equ. Jur.* sec. 1649; *Evans v. Bremridge*, 2 Kay & Johns. 174; *Blest v. Brown*, 3 Giff. 450, S. C. 8 Jur. N. S. 187, S. C. in Appeal, *Ib.* 602; *In re Semple*, 3 Jones & Lat. 488; *Underhill v. Horwood*, 10 Ves. 225, 228; *Burge on Suretyship*, 115, 231;—as to the rule, *Stoytes v. Pearson*, 4 Esp. 255; *Johnson v. Baker*, 4 B. & Al. 440; *Bowker v. Burdekin*, 11 M. & W. 128; *Gudgen v. Besset*, 6 E. & B. 991.

C. Robinson, Q.C., for the plaintiffs, cited *Sidney Road Company v. Holmes*, 16 U. C. R. 268; *Evans v. Bremridge*, 8 DeG. M. & G. 103; *Cooper v. Evans*, L. R. 4 Equ. 45; *Miller v. Tunis*, 10 C. P. 423; *Leaf v. Gibbs*, 4 C. & P. 466.

HAGARTY, J., delivered the judgment of the Court.

This case exemplifies very pointedly the great inconvenience of allowing the issue in fact on the plea to be tried before the decision as to its legal sufficiency.

We entertain very great doubt as to the validity of the plea, in consequence of the total absence of any allegation of the plaintiffs' complicity in the alleged "understanding" on which defendant says he became liable.

It is not averred that the deed was prepared as if for execution by others than the defendant, and it is quite consistent with its allegations that the plaintiffs made the demise to Bennett merely on the understanding that defendant should execute, and on the faith of his doing so.

On the evidence at the trial this difficulty disappears. No doubt the plaintiffs who obtain defendant's signature to a deed, must be held responsible for their agent's representations in obtaining it. They cannot avail themselves of the fact of his signature obtained by Kerr, and ignore the means used by Kerr to induce the defendant to sign.

There is certainly evidence to prove that defendant, an illiterate marksman, signed on the clear understanding that the others were to sign, and the authorities support the conclusion that an obligation so obtained cannot be enforced. Amongst many cases, it is sufficient to refer to *Evans v. Bremridge* (8 DeG. M. & G. 109). Turner, L. J., puts it tersely: "I concur in thinking that, as the plaintiff entered into the obligation upon the understanding and faith that another person would also enter into it, he has a right in equity to be relieved, on the ground that the instrument has not been executed by the intended co-surety."

As to the suggestion that he ought at least to be held liable for his share, placing him on the same footing as if it had been executed by the other, Knight Bruce, L. J., says:—"The defendants seek to charge the plaintiff with a contract into which he did not enter. They claim a right to judge and decide for him, that the execution by Mr. Bradley" (the intended co-surety) "was a matter of indifference to the plaintiff, except, possibly, as to a moiety of the debt professed to be constituted by it. The plaintiff, however, was, and is, entitled to judge and decide upon that for himself," &c.

There would be no difficulty, if the plea were properly drawn, in giving relief at law, as a perpetual unconditional injunction would issue on such facts.

The same case also gives a form of an equitable plea in the suit brought at law, which is free from the objection raised on this demurrer, and clearly implicates the obligees in the understanding on which the deed was executed.

Blest v. Brown (3 Giff. 450), decided in 1862, is to the

same effect ; also *In re Semple*, before Lord St. Leonards (3 J. & Lat. 488). In our own Court, *Sidney Road Company v. Holmes* (16 U. C. R. 271), recognizes the doctrine.

We have also to consider whether the defence is available on *non est factum*. It seems that under that plea it can be shewn that the deed was only delivered as an escrow—B. & L. Prec. 403 ; *Stoytes v. Pearson* (4 Esp. 255) ; *Millership v. Brookes* (5 H. & N. 798). There Bramwell, B., says :—" I think I ought to have nonsuited the plaintiff, for it is manifest that he did not mean to be bound till something more was done." Martin, B. : " The fair conclusion from the facts is, that the defendant " (on executing articles of apprenticeship of his son), " said : ' Before I am to be finally bound, an arrangement must be made as to the travelling expenses of my son.' That is delivering the deed as an escrow."

In *Bowker v. Burdekin* (11 M. & W. 147), Parke, B., says :—" In order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction ; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will, nevertheless, operate as an escrow."

Gudgen v. Besset (6 E. & B. 991), may be also referred to.

We incline to the opinion that the defence in this case might be given in evidence under *non est factum*, on the ground that in substance the defendant executed the deed conditionally on its being also executed by the other supposed co-sureties ; that if the plea had been that it was delivered to the witness Kerr not to be delivered to the plaintiffs until it had been also executed by Young and Elliott, and to be an escrow till then, then, as Lord Ellenborough said, in 4 Esp. 255, it would be " a special *non est factum*," and so might be given in evidence under that issue.

Millership v. Brookes (5 H. & N. 798) seems strongly to favor the conclusion that this defence might be so given on these common law traverses without an equitable plea. The case before us seems at least as strong as the case last cited.

On the whole, therefore, we think that the rule should be absolute to enter a verdict for defendant on the first issue, and that the plaintiffs should have judgment on the demurrer. But if defendant prefer, we think we may give leave to have the equitable plea amended, by inserting apt words to connect the plaintiffs with the representations to him, so as to meet the facts in evidence. This can only be done on his paying the costs of the demurrer and argument.

Rule absolute.

Judgment for plaintiffs.

THE QUEEN V. SINNOTT.

Crown cases—Practice—Information for intrusion—Pleading.

Semble, that the Court may direct Crown cases to stand in the new trial paper for argument, with ordinary suits between party and party.

On an information for intrusion upon land of the Crown,—*Held*, there being no proof that the Crown had been out of possession for twenty years, that under not guilty defendant could not give evidence of title under a Crown lease.

Held, also, that the Crown, on this plea, were not entitled to judgment at once, but must go down to trial to shew the intrusion and damages, and because defendants under the plea might shew the Crown out of possession for twenty years, and thus put the Crown to proof of title.

THIS was an information of intrusion for entering upon certain lands of Her Majesty, and with cattle depasturing the same, &c., to which the defendant pleaded not guilty, and issue was taken on the plea.

The case was tried before Hagarty, J., at the last Winter Assizes for the County of York, and a verdict rendered for the Crown and 1s. damages.

On the trial the Crown gave evidence of the intrusion, and the learned Judge ruled that the defendant could not go into evidence of title under the plea of not guilty. It was not alleged, or attempted to be shewn, that the Crown had been out of possession for twenty years.

In Hilary Term, *McMichael* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law and evidence, and for the rejection of evidence, in not allowing the defendant to shew under the plea of not guilty that he had entered into possession and was remaining there under a contract of lease with the Crown, and on the ground of not permitting an amendment of the plea.

This rule was not served till the last Wednesday, and on Saturday *Crooks*, Q. C., for the Crown, shewed cause, having commenced his argument under the belief that the defendant's counsel was ready to support his rule.

McMichael, for defendant, on coming into Court, objected that the case should be put in the new trial paper, and as, in consequence of the late day at which the rule issued, it was too late for the last paper day, it must stand till next term.

Crooks, Q. C., contra, urged that the Crown was not bound by the rules of Court respecting the new trial paper, &c.

Cur. adv. vult.

After Hilary Term the following judgment was given:—

HAGARTY, J.—We have felt some embarrassment on this subject, from the absence of any very direct authority.

We lean to the opinion that, as regards the days for hearing arguments on rules for new trials, this Court may direct Crown cases to stand in the paper with ordinary suits between party and party, as an ordinary incident to their right as to the conduct of business before them. This would not interfere with the practice of giving pre-audience to Her Majesty's Attorney or Solicitor General.

Chapter 21, Consol. Stat. U. C., section 8, empowers the Judges to make general rules and orders for the regulation of the pleadings and practice on informations, suits, and other proceedings on behalf of the Crown, to be laid before Parliament, &c.

We are not aware of any rules having been made under this Act, especially bearing on the question before us. It may perhaps be advisable to consider next term whether one or more rules should not be made to remove all doubt in this matter.

In the meantime, we have determined to hear defendant's counsel next term, and direct that he support his rule during the first week of the term.

If this question should again arise, we shall consult the Judges of the other Court, with a view to the adoption of some rule.

Substantially the matter is not of much account, as even if the Crown have the right to shew cause out of the new trial paper, the Court has the remedy in its own hands of giving the other party an opportunity of being heard before pronouncing judgment.

In Easter Term the case was argued. *Crooks*, Q. C., for the Crown, cited *Savile*, p. 49, case 103; *Ib.* pp. 48, 64; *Coke's Entries*, 372, 377, 378, 379, 381, 390; *Rastell's Entries*, 412; *Porter's Case*, 1 Rep. 39; *Alton Wood's Case*, 1 Rep. 68; *Attorney General v. Stanley*, 9 U. C. R. 85; *Attorney General v. Donaldson*, 7 M. & W. 422; *Attorney General v. Hallett*, 1 Ex. 211; 4 H. & C. 281, 310.

McMichael supported the rule, citing *Savile*, 4, 66.

MORRISON, J.—We are of opinion that this rule should be discharged.

In *Chitty's Prerogatives of the Crown*, p. 332, *et sequ.*, and *Manning's Exchequer Practice*, 198, it is laid down that at Common Law the Crown has the prerogative right, on an information of intrusion, of putting the defendant

on shewing his title specially, and the defendant could not rely merely on his possession, which in ordinary cases is a sufficient title for a defendant; and that, if not guilty, or *non intrusit* generally, be pleaded (and the defendant cannot plead double), nothing but the mere fact of an intrusion being committed is put in issue, and the defendant in possession would be immediately evicted from it.

That Common Law principle was broken in upon by the 21 Jac. I. ch. 14, which enabled a defendant who relied on his possession to shew, under the plea of the general issue, on the trial that the Crown was out of possession for twenty years; and if he succeeded in doing so the Crown was put upon proof of title, and he was entitled to keep possession until the Crown proved title,—while, if he failed or omitted to do so, he was not then entitled to the benefit of the Statute, and must abide all the consequences of the pleadings as before the Act passed. Before the Statute of James, the King was considered in actual possession, and the defendant bound to plead his title as a justification for the trespass and intrusion; and see *Attorney-General of the Prince of Wales v. Sir J. St. Aubyn et al.* (Wightwick, 236).

The case from Savile, 66, cited by Mr. McMichael as authority in his favour for the plea of not guilty and defendant shewing title, is not applicable. That was an information of intrusion at the suit of one Heydon, and not by the Crown.

I am therefore of opinion that the ruling of my brother Hagarty at the trial was correct, and that the evidence tendered was properly rejected.

It was also contended for the defendant that the Crown ought not to have taken issue on the plea and gone down to trial, the Crown being entitled to judgment, and by going down to trial the title was put in issue; but no authority was cited in support of that view. It is certainly not clear from the authorities what the proper course to be pursued is. The subject is treated at length in the case of the *Attorney General v. Stanley et al.*, in

this Court (9 U. C. R. 85). I take it, that as the defendant's plea as pleaded entitled the defendant, by shewing twenty years adverse possession, to put the Crown on proof of title, it was necessary to go to trial to have that question determined, as well as to prove the intrusion and damages.

In the *Attorney General v. Stanley et al.*, it was held that upon a plea of not guilty the Crown was not entitled to enter a general verdict, without giving evidence of intrusion. Sir John Robinson, in giving judgment, says :—“At present I do not see but that the Crown is entitled to an *amoveas manus* on the general issue, as before the Statute, because the defendants have proved nothing to bring them within the Statute ; but I do not see that a verdict can be entered against the defendants on the plea till an intrusion is shewn,”

On the whole, I am of opinion that our judgment should be for the Crown, and the rule discharged.

HAGARTY, J.—I think the case is concluded by *Attorney General v. Stanley* (9 U. C. R. 85), and that the Crown should have judgment. There was no pretence at the trial that the Crown had been twenty years dispossessed. If it had been suggested that such was the case, the fact could have been readily ascertained from the witnesses. The land is within the City of Toronto, between the tracks of the Grand Trunk and Great Western Railways, part of the Ordnance Reserve. Both these roads were constructed, as we know from the public Statutes (if not otherwise), long within twenty years over this Crown property, and the Crown could not have been out of possession for anything like the period suggested, for the first time, in the argument.

Rule discharged.

HENDERSON V. VERMILYEA AND S. GONSOLES.

Deed—Alteration—Escrow—Ratification.

To an action against V. and G. on their covenant as sureties for the payment of rent by lessees, V. pleaded that the agreement was drawn up to be signed by one C. as his co-surety, and delivered by him as an escrow until C. should execute, which C. afterwards refused to do; and that the plaintiff then, without V.'s consent, erased C.'s name and inserted that of the other defendant. The plaintiff replied, that after both defendants had executed, V. ratified the agreement and accepted the other defendant as his co-surety.

There was contradictory evidence as to the ratification, but the subscribing witness swore that V. executed without any condition, C.'s name having been previously erased. The other defendant said he signed at V.'s request; and it was proved that V. had told others he was responsible for the rent.

Held, that this was evidence from which a ratification might be inferred; and as the defendant had laid by for years, leaving the plaintiff to believe, and telling others, that he was bound, a verdict for the plaintiff was upheld.

THE declaration set out a demise by the plaintiff, dated 14th May, 1863, to one Roe and J. J. Gonsoles, for four years, at a named rent, with covenants by the lessees to pay rent and taxes; and alleged that defendants entered into a sealed agreement with the plaintiff, covenanting with the plaintiff for the fulfilment of the lessees' covenants. Breach, non-payment by the lessees, and default in defendants to pay.

Defendant Gonsoles allowed judgment by default.

Defendant Vermilyea pleaded, 1. *Non est factum*.

2. Payment by the lessees.

3. That the agreement was drawn up and prepared to be signed by defendant and one D. Canniff, whose names were inserted therein, and defendant signed the same and delivered it to one Randall as an escrow, to be kept by him, on the special condition that until Canniff should sign it should not be binding on defendant: that afterwards Canniff refused to execute, and never did execute the deed; and the plaintiff afterwards, and without defendant's consent, wrongfully erased the name of Canniff and inserted the name of S. Gonsoles, the other defendant, an insolvent

person, and defendant never ratified or confirmed said deed, and the same is wholly void against him.

Replication, taking issue; and secondly, to the third plea, that after defendant Vermilyea and S. Gonsoles had executed the said deed, and after defendant Vermilyea was aware that the other defendant had executed, he confirmed and ratified said agreement, and thereby accepted the other defendant as his co-surety.

The case was tried at Belleville, before Adam Wilson, J.

The deed was produced. The name of D. Canniff appeared to have been struck out, and that of Sebastian Gonsoles inserted instead. H. Randall was the only witness.

He was examined by commission. He swore that the deed was prepared by him, he was a clerk in the plaintiff's office, and was signed by the parties in his presence in the plaintiff's office in Belleville, on the day of the date. Both defendants were not present together. Roe, the lessee, brought Vermilyea in, who signed in the presence of witness and Roe. He said he thought Gonsoles signed it two or three days before or after this, he was not sure which; that Vermilyea signed without any condition whatever, and Canniff's name was not inserted, and nothing said about an escrow. Witness made the interlineations and erasures at the execution of the deed. He said he could not say which defendant signed first. After he had prepared the deed with Canniff's name, Roe, or one of the parties, could not get him to go surety, so his name was erased and defendant Gonsoles' name used. He made the alteration at the request of Roe and Gonsoles, parties to the lease; the plaintiff was present, but not Vermilyea.

Defendant S. Gonsoles, brother of the lessee, and brother-in-law of the other defendant, deposed that Vermilyea first spoke to him about the matter; he said Canniff would not sign; he could not say if Vermilyea had then signed or not; he urged the witness to sign, saying that the lessee was an honest man; witness said plaintiff would not accept him; defendant said it would make no difference, to go in and

sign it; witness then went to plaintiff's office in Belleville and signed the covenant; he understood Vermilyea had signed it before he, witness, signed it, and he signed it to accommodate Vermilyea, and would not have done so if Vermilyea had not signed; Vermilyea was not present when the witness signed; he had often talked to Vermilyea of his having signed, and never heard any objection till after Roe, the lessee, went away; he did not know Canniff's name was in the agreement.

One Clark swore that after the lessee had left Vermilyea and Gonsoles asked him to rent the place. Vermilyea said the plaintiff held him responsible for the rent.

For the defence, the lessee, Roe, swore that Vermilyea and Canniff were to be the sureties; that Vermilyea and the witness went together to the plaintiff's office. Vermilyea signed it, and said unless Canniff signed it was null and void; he told this to the witness, Randall, who said, if Canniff did not sign, a new paper must be drawn out.

The other lessee, J. Gonsoles, said he went to his brother, the defendant, to ask him to become surety (after applying to several others), on the forenoon of Thursday; he agreed to do so, and witness drove him down to Belleville to sign; Canniff's name was then taken out, and the other put in; from the time the witness spoke to him till he signed, Vermilyea had not seen him.

No question of law, or objection from either side, appeared up to the Judge's charge.

The jury were told that there was no doubt that Vermilyea signed while Canniff's name was in the body of the instrument, and that such signing was a day or two before Gonsoles signed: that the substitution of one name for another was a material alteration: that if the condition sworn to by Roe, and denied by Randall, were made by Vermilyea when he signed, then it was not his deed; that if there were no such condition, still it was not his deed if the alteration was made by the plaintiff without Vermilyea's consent.

The material part of the replication, the learned Judge said, was the confirmation and ratification.

He left the question of ratification to the jury. In answer to an objection by the plaintiff, the learned Judge told the jury that the conversation with Clark was evidence from which a re-delivery or ratification might be presumed.

The jury found for the plaintiff.

Wallbridge, Q.C., obtained a rule on the law and evidence, and weight of evidence, and for misdirection, in holding there was sufficient evidence of ratification and confirmation, and that such was not made to the plaintiff, but in conversations with others; that the verdict was against law, as the deed was altered; and in not directing that the deed was vitiated by the alteration; and on affidavit as to the evidence given; and for surprise as to S. Gonsoules' evidence. The affidavit was that of defendant, denying this latter evidence and that of Clark.

McKenzie, Q.C., shewed cause, filing affidavits in answer. He cited *Hudson v. Revett*, 5 Bing. 368; *Goodright v. Straphan*, Cowp. 202; *Cabell v. Vaughan*, 1 Saund. 291; *Martin v. Hanning*, 26 U. C. R. 80.

Wallbridge, Q.C., contra, cited *Xenos v. Wickham*, 13 C. B. N. S. 381; *Mollett v. Wackerbarth*, 5 C. B. 181; *Davidson v. Cooper*, 13 M. & W. 343, 352; *Gudgen v. Besset*, 6 E. & B. 986; *Bowker v. Burkekin*, 11 M. & W. 128; *Johnson v. Baker*, 4 B. & Al. 440; *Kidner v. Keith*, 15 C. B. N. S. 35.

HAGARTY, J., delivered the judgment of the Court.

Many points have been raised on the argument to which the learned Judge's attention was not directed at the trial. Both parties allowed the case to be left to the jury as depending on the question whether defendant Vermilyea had ratified and confirmed the deed in its altered state, or, in other words, had, as it were, re-delivered and adopted it as his act and deed. Unless we are prepared to hold

that there was no evidence whatever to support this proposition thus broadly submitted by common assent to the jury, we do not think we ought to interfere, as, on the whole, the merits appear to be with the plaintiff.

According to the other defendant's evidence, defendant Vermilyea, after executing the deed, and aware that Canniff would not sign, asked him (S. Gonsoles) to join as surety, and to go in and sign the deed. This was, of course, the deed he, Vermilyea, had already signed. If this direction were communicated, as no doubt it was, to the plaintiff, and on the faith thereof he struck out Canniff's name and inserted Gonsoles, apart from legal difficulty, it would be a moral wrong to take advantage of the plaintiff so acting and changing his position.

But if there was no evidence arising from the conduct and dealing of the parties after the alteration, it would be almost impossible to surmount the difficulty, so well explained by Martin, B., in *Swan v. North British Australasian Company* (7 H. & N. 640). See also *Hibblewhite v. McMorine* (6 M. & W. 200), per Parke, B.

It is difficult to believe that defendant Vermilyea was not fully aware of the change of name having been made, even if S. Gonsoles' evidence on that point be rejected; and he lay by for years, letting the plaintiff believe he was bound to him for the rent, and telling others openly that he was so bound. In this way he may perhaps have so acted towards the plaintiff as to create a species of estoppel *in pais* against denying that this is his deed, as raising the presumption of his having re-delivered it in its altered state.

As Blackburn, J., says, in *Swan v. North British Australasian Company* (2 H. & C. 81), in error, "It is pointed out by Parke, B., that in the majority of cases in which an estoppel exists, the party must have induced the other so to alter his position that the former would be responsible to him in an action for it." Again, in the same case, Cockburn, C.J., says: "It is, in my opinion, essentially necessary that the representation or conduct complained

of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered."

We have examined a great number of cases bearing upon the alteration of deeds, and the effect of subsequent acts and conduct on setting them up as binding after such alteration.

We wish to be understood as deciding this case merely on the ground taken at *Nisi Prius*, and we are not prepared to set the verdict aside on the suggestion made for the first time on the motion for new trial.

We adhere to the views of the law expressed by us in *Martin v. Hanning* (26 U. C. R. 80). We cannot say there was no evidence for the jury, and the merits call for no interference.

If the plaintiff's affidavit filed in answer to defendant's be correct, the evidence is far stronger than that offered at the trial, especially as to the offers made to Clark, at which the plaintiff declares he was present, acting with defendant in asking Clark to lease the place, and also as to defendant having told him, before the alteration in the deed, of his consent to S. Gonsoles being made the co-surety.

Besides the cases cited, we refer to *Doe Lewis v. Bingham* (4 B. & Al. 672), *Hall v. Chandless* (4 Bing. 123).

Rule discharged.

THE CORPORATION OF THE TOWNSHIP OF CHATHAM
v. HOUSTON.

Municipal Corporations—Councillor giving untrue orders as for “work done”—Right of action by Corporation against him—Proof of fraud—Notice of action—Common counts.

The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges: that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favor containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury; whereas the work had not been done, and the plaintiffs thus lost the money. Common counts were added.

It appeared that the Corporation by one resolution directed that \$300 should be granted to each Councillor, defendant being one, to be by them expended on the roads; and by another that \$100 should be placed to the credit of each Councillor, to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the Councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the Treasurer to different persons as for “work done,” which were paid, and it appeared that such work, *though contracted for*, had not then been performed. There was no evidence, however, of any fraud or collusion on defendant's part, or of any gain to himself, except the usual charge to the Corporation of the commission on such moneys as expended.

The jury having found for the plaintiffs, on a direction that moral fraud was necessary to sustain the action,—

Held, that though giving orders false in fact might raise a *prima facie* case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs.

Held, also, that there could be no recovery on the common counts, for defendant had received no money.

Held, also, that defendant was not entitled to notice of action, for he was not acting in the performance of any public duty cast upon him by law.

Quære, whether this action would lie by the Corporation against one of its members, or whether the proper remedy was not in equity, against defendant as a trustee.

Quære, also, whether it could be said that the money was obtained by means of the untrue orders, for defendant, having the control of the money by the resolutions, might legally make payments in advance, and the orders would equally have been paid if they had shewn that the work was only in progress or contracted for.

DECLARATION.—That the plaintiffs, by their Municipal Council, by divers resolutions passed in the year 1866, ordered during that year that divers sums of money should be expended on roads, bridges, and ditches, in the said Corporation, and that the defendant became and was the agent

of the said Corporation for the expenditure of said moneys on the roads and bridges in a certain part of the said Township of Chatham, known as the second division or ward of said Township, and accepted the duty of expending a certain portion, to wit, \$400, of the said moneys in said second division or ward, from and under the Municipal Council of said Corporation; and thereupon and thereafter, as such agent of the said plaintiffs for the expenditure of the said \$400 on the said roads and bridges of and in the said division or ward, falsely and fraudulently represented and reported to the plaintiffs that he, the defendant, had done or caused to be done divers jobs and works on the roads fronting on the seventh, eighth, ninth, tenth, and eleventh concessions in said Township of Chatham, being roads within the said second division, at divers times during said year, to the amount of \$216.88; and by such fraudulent and false representations and reports the defendant drew or obtained, or caused to be drawn, in collusion with persons alleged to have done such works, and otherwise, or obtained out of the Treasury of the said Corporation at such times the said sum of \$216.88, for the use, benefit, and behoof and on behalf of the said Corporation; and by such fraudulent and false representations and reports the defendant, in collusion with persons alleged to have done such works, and otherwise, drew or obtained, or caused to be drawn or obtained, out of the Treasury of the said Corporation at such times, the said \$216.88, on divers false and fraudulent orders of the defendant therefor, falsely representing such work to have been done; and whereby in fact and in truth the defendant, as such agent of the plaintiffs, was guilty of a great breach of duty, and of wilful deceit, negligence and improper conduct, in this, that the said alleged divers jobs and works were not done on the said several concessions or otherwise, as so represented and reported to the plaintiffs by the defendant in order to obtain such moneys, which the defendant well knew at the time and times at which such moneys were drawn from and obtained or caused to be obtained by the defendant from the

plaintiffs; whereby the plaintiffs have lost the said amount of such orders and sums of moneys, together amounting to the sum of \$216.88.

Common counts were added, for money paid, money had and received, and for interest.

Pleads: 1. To first count. Not guilty, by Statute Consol. Stat. U. C., ch. 126. 2. To the first count, that the defendant did not represent that the said work and contracts had been done and completed at the time of giving the said orders, but that the said orders were issued by the defendant to the several persons named therein, and the said moneys paid to them under the said resolution of the said Council after part of the said work had been done, and as advances to enable the said respective parties to make, carry on and complete the several jobs and contracts taken by them, as in the declaration stated. And the defendant says, that before the commencement of this action the said jobs and contracts were all duly done and performed by the said several parties who obtained the moneys therefor.

To the second count—Never indebted.

The case was tried at Chatham, before Richards, C. J. Two resolutions of the Council were put in: the first on the 27th May, 1866, "That the sum of three hundred dollars be and is hereby granted to each Councillor, to be by them expended on the roads;" and on the 8th September 1866, "That the sum of one hundred dollars be placed to the credit of each Councillor, to be expended by them on the roads and bridges in their respective divisions;" and on the 21st November, 1866, \$46 was granted to aid in completing a ditch in the first concession.

Defendant was one of the Councillors for that year. The Township Clerk swore it was understood that the Councillors who resided in the respective divisions would superintend the laying out of moneys in the division; and that the defendant should take the second division. This course had been taken for many years. In the fall of 1867, defendant said the work was done, and wanted the plaintiffs to appoint a committee to see about it. He said he was

wrong in giving the orders before the work was done. The plaintiffs refused, having done so once before. The Councillors had five per cent. for expending the money. Defendant sent in a claim for his percentage in expending this money.

The Township Treasurer proved that fifteen orders, (produced) signed by defendant, were paid by him to the payees named between March, 1866, and January, 1867 (*a*). He also paid other orders from the other Councillors; he never hesitated or made any enquiry in paying these orders; defendant got his percentage.

In 1867 an investigation took place as to the work done in defendant's division. One of the Committee (the Reeve) swore that, in September, 1867, they found some of the work partially done, and some not done at all; that a report was made to the Council; that defendant admitted he had overdrawn a little at the end of 1866; they found in the tenth concession nothing done on orders amounting to \$216.88. He said that defendant at one time said he had taken the parties' word for their having done the work, and again, that he had taken bonds from them to complete it. Other witnesses gave similar evidence.

For defendant, *Robinson, Q.C.*, objected that no notice of action had been proved; that there was no evidence to support this action—no moral fraud: that some of the orders were given before the first resolution; and that under this resolution he had the right to advance the money whether work was done or not; and that this action would not lie by the Corporation against one of the members of the Council.

Leave was reserved to move on the main point.

For the defence, one *Vick*, who had received money on the order, swore that he completed his work, \$11, by September, 1867: that he was prevented from working in

The general form of these orders was:—Please pay to ——— the sum of \$—— for work done on (naming the lot and concession).

(Signed)

JAMES HOUSTON,

Township Councillor.

1866, the ground was so wet, and he had offered the plaintiffs either to pay back the money or do the work. Brown, another workman, said he had done part, and would have done all, but the plaintiffs forbade him. He gave some excuses for not doing it sooner, having met with an accident. Another, Poole, said he had done most of the work, all except two days' work; and evidence was given by one Lamont as to the work of another order holder, one Bissell.

The plaintiffs called rebutting testimony to shew these statements incorrect.

It was further objected, that as the different parties were bound to complete the work, the plaintiffs could compel them so to do, and therefore there was no legal damage.

The Jury were told that the case was based on a charge of fraud: that they must be satisfied that defendant acted corruptly and dishonestly—not merely carelessly, but to defraud the Corporation either for his own benefit or that of the contractors: that if they found for the plaintiffs, they should find such damages as would indemnify the plaintiffs for the misapplication of the moneys in payment of work not done, to be considered as at the time of action brought in January, 1868; that if they found the defendant intended to act dishonestly in giving the certificates, either to get the money himself, or to aid the payees of the orders fraudulently to possess themselves of the money, then to find for the plaintiffs.

They found a verdict for the plaintiffs, \$163.88.

Robinson, Q. C., obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, on the grounds that the money which it was alleged the defendant had obtained, or had induced the plaintiffs to pay, by fraud and false representations, had been previously granted by resolution of the plaintiffs to the defendant; and that defendant, under the facts proved, was a trustee; or for a new trial, on the ground of misdirection or non-direction, in this, that the learned Judge should have directed the Jury to find for the defendant, there being no proof of actual pecuniary

damage sustained by the plaintiffs, nor of fraud or collusion on the part of the defendant, as alleged in the declaration, nor that the work for which the money was paid by the plaintiffs on defendant's orders was yet undone at the commencement of this action; nor of any notice of action given to him, as required by the Statute; and that this action by the Corporation against the defendant, one of their number, would not lie; or on the ground that the said verdict is contrary to law and evidence and the weight of evidence, there being no sufficient proof of such fraud or damage, or that the money was obtained by any wrongful act of the defendant.

Anderson shewed cause, citing, as to the right of action on the common counts, *Lee v. Merrett*, 8 Q. B. 820; *Gingell v. Purkins*, 4 Ex. 720; as to defendant being a trustee, *Roper v. Holland*, 3 A. & E. 99; *Bartlett v. Dimond*, 14 M. & W. 49; *Pardoe v. Price*, 16 M. & W. 451; *Edwards v. Lowndes*, 1 E. & B. 81.

C. Robinson, Q. C., contra, cited, *McPherson v. Proudfoot*, 2 C. P. 57, 69; *Smith v. Trust and Loan Co.*, 22 U. C. R. 525; *Municipal Council of East Nissouri v. Horseman et al.*, 9 C. P. 189; *Municipality of East Nissouri v. Horseman et al.*, 16 U. C. R. 556, 576; *Case v. Roberts*, Holt N. P. C. 500; *Barley v. Walford*, 9 Q. B. 208; *Kirby v. Simpson*, 10 Ex. 358; *Add. T.* 737.

HAGARTY, J., delivered the judgment of the Court.

An examination of the evidence does not induce us to interfere on the weight of evidence or as to excessive damages. If the defendant be liable at all in this action, we cannot say that the finding of the jury as to the amount of damages is wrong, or at least so wrong that we should interfere.

We do not see on what ground defendant can claim to be entitled to notice of action. He has done nothing in this case as a public officer for which it is sought to make him liable. Conceding, for the argument, that a Township Councillor is a public officer, entitled to notice for any act

done by him as such, we still have nothing before us charging him in that capacity. The law cast upon him no duty to see to the expenditure of this money, and to receive a percentage for his trouble. The Corporation might have appointed any one else to perform the duty undertaken by him. He was a Councillor, but it was not as a Councillor, or because he was a Councillor, that he did these acts. It is not for anything pertaining to the duties of his office, or for any abuse of his legal powers as holding such office, or for any malicious or unlawful use of his official powers, that he is here charged.

There is some difficulty as to the form of action, and whether the remedy against him is not in equity as a trustee.

We do not think there can be a recovery on the money counts. No money is proved to have been received by him. *The Municipality of East Nissouri v. Horseman et al* (9 P. 191) seems in point. There the defendant Horseman had given orders on the Treasurer, in conjunction with two other Councillors, also defendants, to pay money to third persons. It was held that money had and received would not lie.

We feel great difficulty, however, on the remaining points.

No terms were imposed on defendant as to the time or the manner in which he was to disburse this money. We are not prepared to hold that he might not legally have paid it in advance to parties with whom he had engaged to do the work, to induce a lower price or other advantage. Such a course might, no doubt, be highly imprudent and dangerous; but would it be illegal? The resolution stated that \$300 was granted to him "to be by him expended on the roads."

His certificates are all as for work done, and the evidence is that he gave some of them, at least, with the knowledge that they were not true in exact terms, or, at all events, that he did not ascertain the truth of his certificates.

If the work had been done, in fact, up to the commencement of the action, there would be no claim for substantial damages.

It can only be on the special count that the plaintiffs can recover, and the learned Chief Justice left the case expressly to the jury that it was fraud and not carelessness on which the action was based.

We cannot satisfy ourselves that the evidence supports the charge of fraud. There is no proof whatever of any personal gain to defendant, or anything beyond either carelessness or a desire to aid the parties by advances in performing the work. The whole complexion of the case would seem to indicate a line of conduct on defendant's part, in advancing these moneys on the *bonâ fide* belief that the work would be done to the amount of the orders.

Unless we can hold that the insertion by him in the orders of the words, "for work done," when it was either only in progress or contracted to be done, must of itself prove the allegation of fraud, we hardly can see what can be suggested as proof.

But, had he given the orders in another shape,—*e.g.* "for work in progress," or "for work contracted to be done,"—the Treasurer would equally have paid the money to the contractors, and the position of the Municipality would be precisely the same as it is now. Had this been done, we think the charge of fraud or *mala fides* would be out of the question.

Can it be said, in the words of the declaration, that defendant by this false representation caused this money to be drawn from the plaintiffs' Treasury, whereby it was lost to them? The evidence seems to negative this idea. The money was paid according as he directed it to be paid, without enquiry, and his stating that it was "for work done" was not the means of its being paid, nor the cause of its being paid. If defendant, under the resolutions of the Council, had the control of the amount voted, the form of his orders, or any assertion therein contained, was not the means of the money being paid or lost.

In this view, we do not think the verdict for the plaintiff can stand.

We do not hold that there should have been a nonsuit

entered, as the defendant by giving certificates false in fact would, on proof of the work not being done, raise a *prima facie* case against himself. But we think, after hearing the evidence for the defence, even if the jury disbelieved the witnesses as to the exact amount and value of the work done, there was still enough to shew that the defendant had contracted for the whole being done by those parties; and however foolish and imprudent he may have been in trusting them, the whole evidence scarcely sustains the charge against him; and that the jury should have been so told.

We think there should be a new trial without costs, unless the plaintiffs consent to a *stet processus*.

In *The Municipality East Nissouri v. Horseman*, (16 U. C. R., at page 583,) Sir John Robinson suggests whether Township Councillors who have misapplied Township moneys must be left to be dealt with in a Court of Equity. It would seem also, from what is said at page 569, that they might be liable to an action at the suit of the Corporation for a malfeasance, malicious and without cause, from which a legal damage resulted to the plaintiffs.

New trial, without costs.

RULE OF COURT.

The following Rule was read in Court :—

IN THE COURT OF QUEEN'S BENCH,

AND

IN THE COURT OF COMMON PLEAS.

PROVINCE OF ONTARIO,

Easter Term, 31st Victoria.

Saturday, the 6th day of June, A.D. 1868.

It is ordered that a certain Rule of the Court of Queen's Bench of Upper Canada, now Ontario, made in Michaelmas Term, 9 Victoria, on Saturday, the fifteenth day of November, A.D. 1845, be amended by striking out so much of the tariff of fees annexed thereto as applies to Sheriffs and by substituting therefor the tariff of fees hereto annexed.

(Signed) WILLIAM B. RICHARDS, *C. J. C. P.*

" JOHN H. HAGARTY, *J.*

" ADAM WILSON, *J., C. P.*

" JOSEPH C. MORRISON, *J.*

Certified.

(Signed) L. HEYDEN,

Clerk of the Crown and Pleas.

TARIFF OF FEES—CRIMINAL JUSTICE.

Notice of appointment to the associate Justices of Oyer and Terminer, each	\$0 50
Attending the Assizes, per diem.....	5 00
" Quarter Sessions, per diem.....	4 00
Summoning each Grand Jury for the Assizes or Quarter Sessions.....	12 00
Summoning each Petit Jury for the Assizes or Quarter Sessions.....	24 00

For every Prisoner discharged from Gaol, having been committed by warrant for trial at the Assizes, Quarter Sessions, Mayor's or Recorder's Courts...	\$1 00
Bringing up each Prisoner for arraignment, trial and sentence, in all for each Prisoner, whether convicted or acquitted	2 00
Drawing Calendar of Prisoners for trial at the Assizes, including copies	5 00
Advertising the holding the Assizes	4 00
“ “ Quarter Sessions	2 00
Every Annual or General Return required by law or by the Government respecting the Gaol or the Prisoners therein	5 00
Every other return made to the Government.....	4 00
Every return to the Sessions required by Statute or by Order of the Court	2 00
Drawing Calendar of Prisoners for trial at the Quarter Sessions or Recorder's Court, including copies	3 00
Returning Precepts to the Assizes or Sessions	4 00
Conveying Prisoners to the Penitentiary or Reformatory, or to another County (exclusive of disbursements), for each day necessarily employed	6 00
Arrest of each individual upon a warrant to be paid out of the public funds or by the party, (<i>as the case may be</i>).....	2 00
Serving subpoena upon each person, to be paid out of the public funds or by the party, (<i>as the case may be</i>)...	0 50
Travelling in going to execute warrant or serve subpoena, 10 cents per mile, and the same charge per mile actually travelled in returning with a prisoner; where the service has not been effected, the Justices in Sessions to be satisfied that due diligence has been used; to be paid out of the public funds or by the party, (<i>as the case may be</i>).	
Conveying prisoners on attachment, Judge's order, or <i>Habeas Corpus</i> , to another County, exclusive of disbursements, when no charge allowed by law, for each day necessarily employed, to be paid out of the public funds or by the party, (<i>as the case may be</i>)	6 00

Making return upon attachment on writ of <i>Habeas Corpus</i> . To be paid out of the public funds or by the party, (<i>as the case may be</i>)	\$2 00
Levying fines or issues on recognizances estreated, or other process, £5 per £100 on the first £100 of the sum levied, exclusive of mileage at 10 cents per mile, to be levied under Consol. Stat. Upper Canada, chapter 119, sec. 3 ; and on all sums above £100 the same allowance as on executions in civil proceedings.	
Carrying into execution the sentence of the Court in capital cases, all such sums as shall be unavoidably disbursed, to be taxed by the Court or Judge who passed the sentence.	
Attending and superintending the execution in such cases	20 00
Summoning each constable to attend the Assizes or Quarter Sessions, exclusive of mileage at 10 cents a mile.	0 50
Keeping a record of Jurors who have served each Court.	2 00
All disbursements actually and necessarily made in guarding prisoners, or in their conveyance to the Penitentiary, to any other district, or elsewhere, or for other purposes in the discharge of the duties of his office (when not provided for by law, nor hereinbefore specifically), to be rendered in account in detail, with proper vouchers, to the satisfaction of the Justices in Sessions, and to be by them allowed (<i>a</i>).	

(*a*) This tariff has since been confirmed by an Act of the Province of Ontario.

MEMORANDA.

During this Term the following Gentlemen were called to the Bar:—WILLIAM BARRETT, ALEXANDER GOFORTH, ZEBULON AITON LASH, WILLIAM BELL, WILLIAM MULOCK, WILLIAM BARCLAY McMURRICH, JAMES DINGWALL, GEORGE FREDERICK HARMAN, EDISON BALDWIN FRALECK, FRANCIS ALEXANDER HALL, WILLIAM HENRY MOORE, NICHOLAS SPARKS.

ERRATUM.

At page 424 the above-named gentlemen are erroneously stated to have been called to the Bar during Hilary Term last. The gentlemen called to the Bar during that Term were:—EDWIN MEREDITH, PATRICK MICHAEL NULTY, WILLIAM HENRY LOWE, CHARLES MCFAYDEN, WILLIAM MOSGROVE, FREDERICK ERNEST BURNHAM, THOMAS SMITH KENNEDY.

In Easter vacation the Honorable WILLIAM HENRY DRAPER, C.B., resigned his office of Chief Justice of Upper Canada, and was appointed Presiding Judge of the Court of Error and Appeal (a).

The Honorable WILLIAM BUELL RICHARDS, Chief Justice of the Court of Common Pleas, was appointed Chief Justice of Upper Canada, in the room of the Honorable WILLIAM HENRY DRAPER, C.B.

The Honorable JOHN HAWKINS HAGARTY, one of the Judges of the Court of Queen's Bench, was appointed Chief Justice of the Court of Common Pleas, in the room of the Honorable WILLIAM BUELL RICHARDS.

The Honorable ADAM WILSON, one of the Judges of the Court of Common Pleas, was appointed one of the Judges of the Court of Queen's Bench.

JOHN WELLINGTON GWYNNE, one of Her Majesty's Counsel, was appointed one of the Judges of the Court of Common Pleas.

(a) By a Statute of the Province of Ontario, since passed, the title has been changed to "Chief Justice of the Court of Error and Appeal in Ontario."

MICHAELMAS TERM, 32 VICTORIA, 1868.

November 16th to December 5th.

Present :

THE HONORABLE WILLIAM BUELL RICHARDS, C. J.

“ JOSEPH CURRAN MORRISON, J.

“ ADAM WILSON, J.

CAMPBELL v. LINTON.

Slander—Sealed Verdict—Practice—Costs.

The trial of an action for slander having been concluded, the Court adjourned at 6 p.m., both parties agreeing to a sealed verdict. A sealed envelope was left with the Sheriff's officer for the Judge, with a paper enclosed, signed by all the jury, directing that the defendant should “pay the sum of \$1 damages, and the costs of the suit.”—*Held*, that on this being opened in Court by the Judge next morning, the jury should have been called together, as the plaintiff's counsel required, to assent to the verdict, and have it recorded ; and it having been simply endorsed on the record as written, a new trial was ordered without costs.

Held, also, that the jury had no power to give costs by their verdict.

SLANDER.

Plea—Not guilty.

The case was taken down to trial at the last Spring Assizes at Whitby, before Adam Wilson, J. It was the last cause tried on the 9th of April, and at 6 o'clock, p.m. the Court adjourned, the jury to give a sealed verdict.

In the morning, when the Court opened, a sealed envelope, which had been left with the Sheriff's officer for the Judge, endorsed “Verdict : Case of *Campbell* and *Linton*,” was opened by the Clerk, and on a half-sheet of paper was written—“Case of *Campbell* v. *Linton*, Jury Room, April

9th, 1868. We, the undersigned jurors, do agree in sustaining the charge of slander against the defendant, and that he pay the sum of one dollar damages and the costs of the suit." (Signed) D. Cameron, Foreman, and by eleven other Jurors.

On this, *Harrison*, Q.C., for the plaintiff, desired the jury to be polled before the verdict was recorded. The defendant's counsel objected. The learned Judge thought it ought not to be done, because the verdict was such a one as he conceived he ought to take, and the agreement of the parties was to accept a sealed verdict, and difficulties might arise as to a verdict after the jury had been allowed to separate.

It was also objected for the plaintiff, that the verdict was in such form that the plaintiff was not bound by it, and the Court ought not to receive it, but send the jury back: that the evident intention of the jury was to find a verdict for such a sum as was sufficient to carry costs, and if defendant would not consent to the damages being entered for such a sum, the Judge should send the jury back to consider their finding: that there was such doubt as to the meaning of the verdict and intention of the jury, they should not be allowed to separate without an opportunity of ratifying their verdict; that the verdict must be read to the jury, and if any one of the jury on hearing it should rise and say it was not the verdict they intended to give, they should be sent back.

Defendant's counsel contended that the verdict should be entered for \$1 damages, making no mention of costs.

The learned Judge endorsed the verdict without reading it to the jury. He remarked upon the danger of a jury changing their minds after having separated, and considered that that they had been discharged by the sealed verdict which they gave.

In Easter Term last, *Harrison*, Q.C., for the plaintiff, obtained a rule *nisi* to set aside the verdict and grant a new trial, unless the defendant would consent to the payment of full costs of suit, on the ground that the learned Judge

refused to allow the jury to be polled, and on substantially the same grounds as contended for at the trial, the last ground being that the verdict endorsed was not delivered in open Court.

The rule was enlarged until this term, when

Hector Cameron shewed cause. The rule should have been moved for a *Venire de Novo*, if the plaintiff's view be correct that the verdict was improperly taken, for if this be not the verdict of the jury then there should be a *Venire de Novo*, for in truth there has been no trial. In *Donaldson et al v. Haley*, 13 C. P. 87, a juror having declared his dissent from the verdict before it was finally recorded, it was held the verdict could not be entered against the declaration of that juror for an amount which he did not concur in. It is true the language of Draper, C.J., in giving his opinion in that case, goes to the length of declaring that the jurors are not bound by a sealed verdict, for the next morning when they come into Court they may alter it. The jury here heard the verdict recorded, and if it was not their verdict they could have objected to it; if they did not object, then their silence implied that they assented to it. He referred to *Chit. Arch. Prac.*, 12th ed., 410; 3 *Black. Com.* 377; *Doe dem. Earl of Ashburnam v. Michael*, 16 Q. B. 620. In *Napier v. Daniel et al.*, 3 Bing. N.C. 77, the jury expressed themselves satisfied as to one point in favor of the plaintiff, yet on that point in effect found for defendant, but the Court would not disturb the verdict. In *Doe Lewis v. Baster*, 5 A. & E. 129, the Court refused to disturb a verdict entered for the plaintiff against the dissent of the jury. *Burlingame v. Burlingame*, 16 Wisconsin, 285, referred to in the U. S. Digest of 1865; *Goodwin v. Appleton*, 9 Shepley 453; *Saunders v. Freeman*, Plowden 211; *Collier v. Gaillard*, 2 W. Bl. 1062; *Surman v. Shelleto*, 3 Burr. 1688; *Co. Lit.* 227 b.; *Savile v. Jardine*, 2 H. Bl. 531; *Turner v. Horton*, Willes 438; *Commonwealth v. Clapp*. 4 Mass.

169. The case of *Brown v. Gibbons*, 2 Ld. Raym. 831, S. C. Salk. 206, does not authorize the taxing of full costs, for the part of the case which refers to that only speaks of the jury giving the plaintiff £10 costs when they gave but 10d. damages.

Harrison, Q.C., contra—The Judge may enter the verdict according to the intention of the jury, and where the verdict was entered wrongly by mistake, the Judge who tried the cause could amend the postea; or, at all events, if this is not done, a new trial or a *venire de novo* should be had, and the Court may mould the rule in any form they think proper. If there was any doubt about the matter the Court would grant a new trial. *Rex v. Moodie*, 2 Stark. 111; *Roberts v. Hughes*, 7 M. & W. 399; *Bentley v. Fleming*, 1 C. B. 479; *Samson v. Harkin*, 18 U. C. R. 596; *Ernest v. Brown*, 4 Bing N. C. 162; *Cogan v. Ebdon*, 1 Burr. 383; *Doe Church et al v. Perkins et al*, 3 T. R. 749; *Rex v. Woodfall*, 5 Burr. 2661; *Wakelin v. Morris*, 2 F. & F. 27, note; *Hullock* on costs 27; *Marshall* on Costs 15; *Skinner v. Shoppee*, 6 Bing, N. C. 131. The case of *Brown v. Gibbons*, 1 Salk. 206, shews the jury may give costs; and *Phillips v. Bacon*, 9 East 304, shews that where costs are mentioned as part of the damages they may be properly so considered. If the plaintiff is allowed costs he does not want a new trial.

RICHARDS, C. J., in *Chitty's Archbold's Practice*, 12th ed. 411, it is laid down:—"A public verdict is that which is given by the jury in open Court, whilst the Court are sitting. A privy verdict is given before one of the Judges of the Court, after the Court have risen; but it must be observed that, if the Judge adjourn the Court to his lodgings, and the jury there deliver their verdict, this will be a public and not a privy verdict,"—citing 3 *Black. Com.* 377 a.; *Dawson v. Howard*, 1 Lord Raym. 129. "A privy verdict must also be confirmed by the jury in open Court, before it can be recorded; before which time the jury may vary from it if they think proper; but after a verdict is

recorded, no alteration, however slight, can be made in it. Also, before the verdict is recorded, a jury is at liberty to vary from the first offer of their verdict, and to tender a new verdict; and that verdict which is recorded shall stand." *Co. Lit.* 227, 227 b., and *Napier v. Daniel*, 3 Bing. N. C. 77, are referred to as authority. The language in *Co. Lit.* 227 b., is this:—"After they be agreed they may, in causes between party and party, give a verdict, and if the Court be risen, give a privy verdict before any of the Judges of the Court, *and then they may eat and drink*, and the next morning in open Court they may either affirm or alter their privy verdict, and that which is given in Court shall stand."

3 *Black. Com.* 377: "A privy verdict is when the Judge hath left or adjourned the Court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the Judge out of Court; which privy verdict is of no force unless afterwards affirmed by a public verdict given openly in Court; wherein the jury may, if they please, vary from their privy verdict, so that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the public verdict."

It is argued that the verdict in this cause is not a privy but a sealed verdict; and being taken by consent, and the jury allowed to go at large, they are discharged from the further consideration of the case, and all that remains to be done is to record the verdict given by them in open Court.

The argument that if after agreeing to a sealed verdict that may be afterwards altered by the jurors, and if they are allowed to go at large they may be tampered with, and be induced to change it, is one that is entitled to grave consideration; and if this were a case of first impression, I should feel much inclined to hold that the sealed verdict taken by consent should bind the parties.

The reason for not allowing a jury to go at large is

forcibly put in the answer of the Judges as delivered by Lord Chief Justice Herbert at the trial of Lord Delamere, (11 Howell's State Trials, 559,) as referred to in argument in *The King v. Kinnear, et al.* (2 B. & Al. 463): "The law is clear, the jury once charged can never be discharged till they have given their verdict; and the reason of that is, for fear of corruption and tampering with the jury."

The language from *Blackstone's Commentaries*, above quoted, would seem to shew that they, the jury, were delivered from confinement when they had rendered their privy verdict, and this was a dangerous practice, for it allowed time to the parties to tamper with the jury. If they were not allowed to go at large, one does not see how they could be tampered with, particularly if they were in charge of *six* bailiffs, as is stated to be the case with a jury who have retired in some of the older cases. If they were allowed to go at large after a privy verdict, and then they were to confirm their verdict next day, and were then allowed to alter and change it, the evil could be no greater if allowed to do the same thing when a sealed verdict was handed in.

I have always understood the practice to be in this country, when a sealed verdict is given by the jury on consent of parties, that the jury are to come into Court next day and confirm their verdict. The case referred to in 13 C. P. 87 seems to me expressly in point. I should feel bound by that judgment, even if I had not when a member of that Court concurred in it. I think the understanding of the Bar, and the reasoning from the analogous case of a privy verdict, will fully sustain that decision.

One of the important requisites to verdicts is that they shall be *public* verdicts, in which the jury openly declare the finding of the issue for the plaintiff or the defendant. When the Judge adjourns the Court to his lodgings, and the verdict is taken there, it is equally a public verdict, for the Court is held there for the time being.

I think, therefore, the learned Judge who tried the cause ought to have directed that the jury should have been

asked in the morning, after entering the verdict on the record, to hearken to their verdict as the Court records it, the Clerk of assize reading it out to them and getting their assent to it.

The jury, however, in addition to the finding for the plaintiff one dollar damages, added, "and the costs of the suit."

Can the plaintiff, under this finding, recover the costs of the suit, and under the Statute 21 Jac. I., ch. 16, sec. 6. That section reads thus: "In all actions upon the case for slanderous words, * * * if the jury upon the trial of the issue in such action, or the jury that shall enquire of the damages, do find or assess the damages under 40s., then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, Statute, custom or usage to the contrary in any wise notwithstanding." In the same edition of *Chitty's Archbold*, from which I have already quoted, at p. 473, it is laid down, that the Statute of James only restrains the Court from awarding more costs than damages, but the jury not being restrained thereby, may give what costs they please. *Brown v. Gibbons*, (1 Salk. 206,) is referred to as authority.

In *Brown v. Gibbons*, (1 Salk. 206,) it is said, "*Nota, Mich. 5 Car. I. C. B.*, it was said by Richardson" (Chief Justice C. P., afterwards Chief Justice K. B.) "to be the resolution of all the Justices of B. R. and C. B., that in an action upon the case for slander, though the Court are bound by 21 Jac. I. cap. 16, and cannot increase the costs where the damages are under 40s., yet the jury are not bound by that Statute, and therefore they may give £10 costs where they give but 10*d.* damages." S. C. 2 Ld. Raym. 831, does not refer to the jury giving more costs than damages. See also *Cro. Car.* 163, 307; *Page v. Kirke*, 2 Vent. 36; note to *Mears v. Griffin*, 1 M. & G. 798.

Sec. 234 of the Common Law Procedure Act, Consol. Stat. U. C., Ch. 22, states that—"If the plaintiff in any action of trespass or trespass on the case, recovers by the ver-

dict of a jury less damages than *eight dollars*, such plaintiff shall not be entitled to recover in respect of *such* verdict any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the Judge or presiding officer before whom such verdict is obtained, immediately afterwards certifies on the back of the record, * * that the trespass or grievance in respect of which the action has been brought was wilful and malicious." This enactment is similar to the Imperial Statute 3 & 4 Vic. ch. 24, sec. 2.

In *Mears v. Griffin* (1 M. & G. 796.) The Chief Justice, before whom the action was tried, (which was for slanderous words) in summing up, told the jury that the plaintiff had come into Court to clear his character, and not to seek for large damages, and that they were to give him such damages as would set his character right with the world. The jury found for the plaintiff with one shilling damages.

A motion was made for a new trial, on the ground that the jury gave the small damages, under the impression it would carry costs.

Tindal, C. J., in giving judgment, said,—“The question of costs not being a matter which the jury ought to take into consideration, the only ground on which we could grant a new trial, would be the insufficiency of the damages *
* The jury may have thought the plaintiff sustained very little injury from the speaking of the slanderous words.” Bosanquet, J. said—“The propriety of disturbing the verdict must be considered without reference to the question of costs, with which the jury had nothing to do.” Coltman J.—“The question for the jury was, what injury the plaintiff had sustained.” Maule, J.—“It would appear that the jury, in giving a shilling as sufficient damages, were not aware that it would not carry costs; and probably if they had known that fact, they would have given more damages than they would otherwise have thought the plaintiff entitled to, in order to remedy the state of the law. But if

they had done so, they would have acted improperly. If the law is wrong the right course is to get it altered. Presuming, therefore, that the jury were unacquainted with the effect of their verdict, they were in a *proper* state of ignorance; for a jury ought not to allow a knowledge of the consequences to affect the amount of damages."

In a note by the learned editors, they say—"The plaintiff's claim is for damages sustained *before action brought*. The costs of an action cannot, in strictness, form part of the damages sustained antecedently to the bringing of that action; but where, from want of evidence directly shewing, or leading to a presumption of, actual damage, a verdict with nominal damages is returned, it would seem to be the duty of the jury to assess the full amount of the plaintiff's costs, as far as the amount can be ascertained, except where the plaintiff, knowing that such an assessment by the jury is unnecessary, is content that the verdict shall be taken for a nominal sum." They then quote the words of 21 Jac. I. ch. 16, already referred to, and add—"It would appear that even in slander, the power of the jury to assess the full amount of the costs is not taken away." Reference is then made to the statement of Richardson, J., abstracted above, and noted at the end of the case in 1 Salk. 206.

In *Poole v. Whitcomb* (12 C. B. N. S. 770), the plaintiff's counsel, in his address to the jury, informed them she, the plaintiff, would probably not have her costs unless they gave her a verdict for at least five guineas. The Judge, in his charge, cautioned the jury, if they found for the plaintiff, to give her such damages as they thought she was entitled to for the assault, but they must not permit themselves to be influenced by a notion as to what sum would carry costs. The jury found for the plaintiff, damages *five guineas*.

The defendant moved for a new trial, on the ground that the jury did not exercise an independent judgment in finding for the plaintiff for five guineas, the counsel for the plaintiff having told them that a verdict for £5, or less than £5, would throw the costs and expenses of the trial

on her; and because the damages were excessive, and contrary to evidence, the jury being influenced by the statement of counsel.

In shewing cause, it was contended that costs are included in the word damages; that juries have a right to consider them as well as the damages, and it was only by the usurpation of the Courts they have been severed. Reference was made to the part of the case of *Brown v. Gibbons*, in 1 Salk., already quoted, which stated that the jury were not bound by the Statute of James as to giving costs in slander, and a quotation from *Hullock* on costs, P. 3, is referred to as follows:—"As the costs found by the jury were in a legal sense part of the damages, the fact of the amount being increased did not change their character, and so the whole amount of the costs, both those found by the jury and the increased costs, were and still are in a legal sense damages." *Deacon v. Morris* (2 B. & Al. 393), decided that when a Statute gave treble damages to the plaintiff, without saying anything about costs, it impliedly gave treble costs also. In giving judgment, the Court said—"In ordinary cases the party recovers damages, being so much for the damages by him sustained, and so much for his costs. The costs therefore are part of the damages, and consequently the act of Parliament by giving treble damages impliedly gives treble costs."

In *Gray on Costs*, pages 1 to 3, the same view is taken. At page 3 it is stated—"A practice was, however, introduced, which the Statute rendered legal, of severing the damages, and shewing in the verdict of the jury how much of the amount was given for costs. The Court could then judge whether enough had been given for costs; and if not, what further sum to give by way of increase, and accordingly awarded a further sum; and this is the origin of *Increased Costs*. The practice was probably at first introduced, because the necessity for ascertaining the amount of the costs before the jury gave their verdict was found inconvenient * * The whole amount of costs,

both those found by the jury and the increased costs, were, and still are, in a legal view, damages."

In *Poole v. Whitcomb*, already referred to, most of the cases on the subject were cited. The Court ordered a new trial. In the argument, referring to *Levy v. Milne* (4 Bing. 195) Williams, J., said—"Burrough, J., in that case, expressly says, that the jury had no right to take into their consideration the question of costs; they have only to deal out the damages;" and furthermore, in reference to the argument that the jury may be supposed to know the law that a certain amount of damages would carry costs, Williams, J., further observed—"Which if the jury apply would lead them to a wrong conclusion." In giving judgment, Willes, J., said—"Whether the plaintiff was to have costs or not, was clearly a matter which was to be decided by the Court, and not by the jury. It is idle to say that to take the consideration of the costs from the jury is an usurpation on the part of the Court, because the very last statutory provision upon the subject, the 34th section of the C.L.P. Act of 1860, 23 & 24 Vic., ch. 126, expressly enacts that 'when the plaintiff in any action for an alleged wrong in any of the Superior Courts recovers by the verdict of a jury less than £5, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the Judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of enquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought.' The Legislature there in express terms says, that it is the Judge and not the jury who have the power of deciding whether or not the plaintiff shall have costs. Here the jury were made to suppose that they were the proper persons to decide the question of costs—a thing

which it was wholly incompetent to them to do. It is most important that the province of the Judge and that of the jury should be kept distinct * * * * I think it would lead to a most inconvenient inequality in the administration of the law, if the question of costs were in any shape left to the consideration of the jury. I cannot entertain the slightest doubt upon the subject." Keating, J., said—"To give effect to the argument of the plaintiff's counsel would be to transfer to the jury that which the legislature has emphatically said shall be the province of the Judge."

In *Kilmore v. Abdoolah* (27 L. J. Ex. 307, American edition of 3 H. & N. 957, tried in Easter Term, 1858,) at the trial of the action, for assault and false imprisonment, the jury gave a verdict for the plaintiff, damages £5. The counsel for the plaintiff applied immediately for a certificate for costs. The learned Judge, Watson, B., declined to give it, when the foreman of the jury said that they had given their verdict on the supposition that it would carry costs. On its being intimated by the plaintiff's counsel that £5 5s. would do so, they appeared disposed to increase their verdict, and Shee, Sergeant, submitted they had a right to do so, but the learned Judge refused to allow the verdict to be altered. A new trial was moved for, on the ground of miscarriage of justice. Bramwell, B., said—"It is unjust to sue in a Superior Court in a case of so trivial a character, and it would be unjust to give a plaintiff costs in such a case." For the plaintiff, it was urged the verdict was smaller in reference to the injury received than it would have been if the jury had not been in error as to the Law. Bramwell, B.,—"They had no right to give a verdict with reference to anything else than the injury sustained by the plaintiff." It was again urged for the plaintiff that they gave the plaintiff less than he was entitled to in consequence of their ignorance of the law. Channell, B.,—"It was not necessary that they should know the law as to costs in order to assess the damages." The Court refused the rule.

As to informing the jury what damages would carry costs Pollock, C.B., said, "There is no reason why they should not be informed, if they ask it, as it is a part of the law.

Wakelin v. Morris (2 F.& F.26) shews that Erle, C.J., when asked by the jury what amount would carry costs, said, "I am not aware that there is anything to preclude my telling you, but the liability to costs depends upon various statutory enactments which it is not easy always to carry accurately in mind, and the answer might mislead you." There is an elaborate note appended to this case referring to authorities, and arriving at the conclusion that the jury are entitled to know the rule as to costs, to enable them to judge whether they will give any damages beyond the costs in cases where they has been no real damage.

In *Kelly v. Sherlock* (L. R. 1 Q. B. 686) in a report of what took place at Nisi Prius, at P. 691, the jury having retired, returned into Court after an hour and a quarter, saying they could not agree. One of them inquired what verdict would carry costs. The learned Judge (Bramwell, B.) replied that it was a question which he had discussed with the late Lord Campbell, and the conclusion come to was, that the question was one which ought not to be answered by the Judge. It was for the jury to say, if they found for the plaintiff, to what extent he had been damaged, irrespective of the effect the verdict might have on the question of costs, otherwise they might actually defeat the law. On a further reference to the question, the Judge said, "The law supposes that you will give such damages as you think are really equivalent to the injury sustained by the plaintiff. And it says, in certain cases, for the prevention of frivolous actions, if the plaintiff does not recover a certain amount he shall try his action at his own expense. Now it seems to me that you ought to say to yourselves, 'we will give a certain amount;' but the amount ought not to be regulated by its effect upon the costs. Because it is manifest, if you say we will give a certain sum in the hope it will carry costs, that you thereby defeat the object of the law."

In strictness, I suppose we are not now called upon to express our opinion whether, as the verdict now stands, the plaintiff is entitled to tax full costs. The strong language used by the Judges in the late cases seems to imply that the jury have nothing to do with the question of costs, and though they might, under the Statute of James, give a specific sum for costs as a part of their verdict, yet that could not properly be done under the provisions of the section of the Common Law Procedure Act, similar in effect to the English Statute, 3 & 4 Vic., ch. 24, sec. 2. The words of the Statute of 1860, under which *Poole v. Whitcomb* was decided, so much resembled section 224 of our Common Law Procedure Act as consolidated, that I do not see how we could, in the face of that decision, hold that the jury had anything to do with the question of costs, or how we can give effect to their finding in relation to that question.

The effect of the section of our Common Law Procedure Act is, if the plaintiff recovers by the verdict of a jury less damages than eight dollars, he shall not be entitled to recover in respect of such verdict any costs whatever, unless the Judge certifies the action was really brought to try a right, &c. Under the English Act of 1860, when the plaintiff recovers by the verdict of the jury less than £5, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, in case the Judge certifies it was not really brought to try a right, &c., and that the action was not fit to be brought. It seems to me the same rule of construction as to costs should apply to both the sections.

I think the rule should be absolute for a new trial, without costs.

ADAM WILSON, J.—It is important the practice, which is the law, should be understood and settled respecting the taking of sealed verdicts, and discharging the jury before their finding has been formally recorded.

It appears from the quotation from *Co. Lit.* 277 b., that after the jury are agreed and give a privy verdict, they

may eat and drink ; but it is not expressly said that they are still to be kept together until they affirm or alter their verdict in open Court. The inference is that until their verdict is privily given, they are not to be discharged.

In *Saunders v. Freeman*, (1 Plowd. 211, 212,) to which I referred during the argument, this is put beyond all doubt, for the record there shews that after the jury were charged they retired from the bar to communicate with one another under the custody of a bailiff: that after the adjournment of the Court until the morrow the jurors, under the custody of the bailiff, in the absence of the parties, on the evening of the day of adjournment came before the Justices at the inn of the Justices, and being asked if they were agreed of their verdict, said they were ; and thereupon the jurors secretly said—setting out the verdict ; and then the jurors, for their ease, (as is the custom) to eat and drink together if they pleased, and to lie together until the morrow, and then to give their verdict aforesaid openly before the said Justices, by the command of the said Justices, departed together under the custody of the aforesaid bailiff into the place from whence they came ; on which said day, (the morrow,) before the Justices in open Court came the plaintiff by his attorney, and the jurors of the jury, under the custody of the bailiff aforesaid, being called to give their verdict aforesaid, openly came, whereupon the verdict given before the Justices on the evening aforesaid being by the Court then read and repeated, and the jurors of the jury being asked whether or no they would affirm the said verdict, the said jurors, not denying they had given the said verdict, but for certain causes specially moving them, and their conscience holding the said verdict for nought, answered they were now otherwise agreed, &c., &c.

The case further shews that the plaintiff is not demandable on a privy verdict ; but he is where the jury come into open Court to give their verdict, and he may then be nonsuited ; and that the privy verdict should not be taken as the verdict, but the one which they pronounce openly in Court, and that they may also change their verdict given

in Court before it is recorded, "and *a fortiori* they may change it upon better advice when their first verdict was given out of Court, and *they not discharged*, for they were not out of the custody of the bailiff, but always under his custody, as the record shows."

In 21 *Vin. Abr.*, Trial, p. 440 and 445, this law is also so stated.

In *Dalbie's Case*, 21 *Vin. Abr.* 440, it is said, if on an *extendi facias* the Sheriff impanel a jury, "and they deliver the verdict to the Sheriff in writing, they may after make it more formal, but they cannot alter it in substance; for it is a complete verdict by the delivery of it to the Sheriff." This, however, is not quite similar to a suit between party and party. See also the *Duke of Richmond v. Wise*, (1 *Ventr.* 124.) *Lord Grey's Case* (9 *St. Tr.* 186.)

If the jury by giving a privy verdict gain permission to eat and drink, and be not discharged, but are kept together until they give their final verdict in open Court, there would be no objection to a privy verdict at any time, for by keeping the jury together it would be kept secret from each of the parties until it was affirmed in Court.

But if after giving their privy verdict they are to be discharged, and are yet allowed to change their verdict at any time before it is recorded, there will be great risk of the jury being tampered with while they are at large, and the whole benefit of a guarded seclusion, which the law requires, must be completely frustrated.

In 3 *Black. Com.* 277, it is said, in reference to privy verdicts it is "a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged in." And *Stephen*, in his commentaries on this passage, adds, 5th ed., vol. 3, p 651, note: "At the present day it is wholly disused."

In this case the idea I had was, that the sealed verdict having been agreed to be taken, and the jury to be thereupon discharged, and they were so discharged, that the sealed verdict was to be the final verdict, unless some mere informality or plain mistake required to be corrected.

That the jury did talk about their verdict is notorious, for every body knew what it was long before the seal had been taken off the packet which they had so securely delivered to the Sheriff. When I first became aware of this, I was struck with the folly of permitting a jury to be discharged until their verdict was finally recorded, for the sealed or privy verdict, if it is to be followed by a discharge, will probably be used by some one or more of the jury as a mere pretext to get the opportunity of consulting with those who should have no part in their deliberation, and may be applied to the most corrupt purposes.

I had in my mind too the case of *Merner v. Klein*, tried at Berlin, before Mr. Justice Morrison, in the year 1867, after a new trial had been granted by the Court of Common Pleas (17 C. P. 287), in which the like difficulty arose, and I thought it right to have the practice settled in such cases.

I endeavored, after the case was over, to get the defendant's counsel to agree that the damages should be increased to \$10, if the Court should be of opinion the jury could alter their finding under such circumstances, but he would not consent. If I had thought of it in time, I would have taken the amended finding of the jury unless he did consent, and have left him to move, which would have been the proper course, to save the uselessness of another trial.

Or if the plaintiff's counsel had moved for a certificate for costs, we might have helped him even then, as it is only the costs which are in dispute.

I felt then and still feel a difficulty as to the right of collecting the jury again, when they have once been *discharged*. I mean by this, not merely allowed to separate, and to appear the next morning to affirm or alter their verdict, but *discharged*, and *upon the consent of parties*, on the agreement and condition of their giving a sealed verdict, which was by myself and I think was considered by the counsel also, as the full substitute for the verdict in open Court—See *The State of Ohio v. Engles* (13 Ohio Rep. 490), *Burlingame v. Burlingame* (16 Wisconsin 285),

Nichols v. Suncook County (24 R. 437), *Breck v. Blanchard* (27 R. 100, 103, referred to in Morrison's New Hampshire Digest, 447).

I am not satisfied that this sealed verdict so taken should not be taken to be conclusive between the parties, as much so as if it had been proclaimed openly in Court.

The general rule of law, however, is that until the verdict has been recorded it may be withdrawn or varied from, and as the other members of the Court think this rule must prevail even under the circumstances detailed, I shall not differ from them; but I shall *wholly disuse* this practice, as it is said to be disused in England; and what other practice may be adopted in its stead, except imprisoning the jury for the night, I cannot tell.

As to the costs, I think the jury could not give them. The case in *Salkeld* was cited in *Poole v. Whitcomb* (12 C. B. N. S. 770). See also *Kelly v. Sherlock* (L. R. Q. B. 691).

MORRISON, J. concurred.

Rule absolute.

VAN NATTER V. THE BUFFALO AND LAKE HURON RAILWAY COMPANY.

Buffalo and Lake Huron and Grand Trunk R. W. Cos.—Agreement between under 29–30 Vic, ch. 92—Construction and effect of—Evidence of acceptance of such agreement—Not guilty, by Statute—Appeal from Coun'y Court—Amendment

The Grand Trunk and the Buffalo and Lake Huron Railway Companies entered into an agreement, by which the net receipts of the two undertakings were to be divided between them in specified proportions, the Grand Trunk to have the option, within six years, of purchasing the share capital of the other on certain terms, and the control and working of the B. & L. H. undertaking to be placed in the hands of the G. T., under a joint committee of two nominees from each board: the agreement to subsist for 21 years, during which the B. & L. H. Railway and its appurtenances were to be kept in repair by the G. T.

The 29–30 Vic., ch. 92, confirmed this agreement, and enacted that the G. T. in working the other railway, should have all the powers conferred on the B. & L. H. Co., by Statute or otherwise. It provided, also, that the Act should not come into operation until accepted by the shareholders of the two Companies, and such acceptance certified in the manner directed, of which acceptance and certifying a notice in the *Canada Gazette* should be conclusive proof. By a private Act of the Dominion, afterwards passed, 31 Vic. ch. 19, it was recited that this agreement had been duly accepted.

In an action against the B. & L. H. Co., for an accident caused by defect of fences on their line in 1867, it was proved that the G. T. were supposed to own and were managing and running that railway.

Held, affirming the judgment of the County Court, that on these facts,—either with or without the 31 Vic. ch. 19, which, however, was receivable, and entitled to some weight,—there was evidence for the jury from which an acceptance of the agreement might be presumed.

Held, also, that the G. T. Co., being in possession of and working the railway under the agreement, were bound to fence; and that the defendants were not liable.

In pleading the general issue by Statute, any Statute relied upon for the defence must be referred to in the margin, as well as that by which such plea is allowed.

But where such a Statute had been omitted in the County Court, this Court, on appeal, directed the Court below to amend by inserting it.

Where, in the inducement of the declaration, it was alleged that defendants were proprietors of the railway, not saying at the time of the negligence complained of—*Held*, that under an ordinary plea of not guilty, defendants might shew that at such time it was not their property.

APPEAL from the County Court of Welland.

The declaration stated that the defendants were proprietors of the railway in question, upon which steam engines, carriages and cars, were propelled; and it was the duty of the defendants to erect and maintain on each

side of the railway fences of the height and strength of an ordinary division fence, with openings, or gates or bars therein, at farm crossings for the use of the proprietors of the adjoining lands, and also cattle guards at all crossings, suitable to prevent cattle and animals from getting on the railway: that before and at the time when, &c., the plaintiff was proprietor and lawfully possessed of a farm in the Township of Molton, through which the railway passed, and adjoining to and abutting on the railway. Yet the defendants, not regarding their duty, did not erect and maintain on each side of the railway adjoining to and abutting on the land of the plaintiff, fences of the height and strength of an ordinary division fence, by reason whereof a horse of the plaintiff's, lawfully depasturing on the land of the plaintiff, adjoining the railway, strayed from the said land on to the railway, and was there killed by a locomotive and train of cars then proceeding upon the railway.

The defendants pleaded not guilty, by the whole of the following Acts, being public Acts—that is, by Consol. Stat. C. ch. 66, 19 Vic. ch. 21, and 16 Vic. ch. 37.

The evidence shewed a defect of fences along the railway adjoining the plaintiff's land, and that the plaintiff's horse was killed on the railway by a train passing along, having escaped from the plaintiff's land to the railway by reason of such defect.

At the close of the plaintiff's case, the defendants' counsel moved for a nonsuit, on the ground that the action, if any, should have been brought, not against the defendants, but against the Grand Trunk Railway Company, as the Act 29–30 Vic. ch. 92, relieved the defendants from maintaining the fences along the railway, and cast the duty of doing so on the Grand Trunk Railway Company.

Leave was reserved to the defendants to move to enter a nonsuit, and a verdict was taken for the plaintiff for \$120. Defendants afterwards obtained a rule *nisi* to enter a nonsuit, which, after argument, was made absolute.

The learned Judge of the County Court, in giving judg-

ment, was of opinion the effect of the Statute last mentioned, 29-30 Vic. ch. 92, was to put, for all practical purposes, the Grand Trunk Railway Company in the place of the defendants, and to discharge the defendants from maintaining the fences along the line, and to cast that duty upon the Grand Trunk Railway Company. He was also of opinion it was not necessary the defendants should have referred to that Statute in the margin of their plea.

The plaintiff appealed from this decision, on the following grounds:—That the defendants should not have been permitted to rely on the Act last referred to, as it was not mentioned in the margin of their plea; that even if the Act last mentioned had been referred to in or by the plea, the defendants were not relieved from maintaining the fences along the line of the railway; that no evidence was given that the formalities of the Act 29-30 Vic., ch. 29, had been complied with, or that the Act had been accepted by the Railway Companies.

Harrison, Q.C., for the appellant. The complaint against the defendants is for nonfeasance—the not fencing their line. The general issue under Consol. Stat. C. ch. 66, sec. 83, cannot be pleaded in such a case—*March v. The Port Dover, &c., Road Co.*, 15 U.C.R. 138; *Harrison v. Brega*, 20 U.C.R. 324. The plea should have referred to the 29-30 Vic. ch. 92, as an Act that was specially relied on in defence; and not having done so, it must be considered as an ordinary general issue, which merely denies the wrongful act and admits all the matter of inducement, including the allegation of its having been the defendants' duty to maintain the fences: *Edwards v. Hodges*, 15 C. B. 477.

The 29-30 Vic. ch. 92 is a conditional Act. It is a mere agreement between the two companies, legalized by Act of Parliament; and sec. 7 provides that the Act shall not take effect until the agreement has been approved of by the shareholders of the respective companies. The *Canada Gazette*, according to sec. 8, should have been produced at the trial, to prove the acceptance by the shareholders of

the companies of the agreement and of the Statute passed upon it; *Tay Ev.*, 2d ed., secs. 1279–1281; *Rex v. Forsyth*, Russ. & Ry. 274; *Rex v. Holt*, 5 T. R. 436; *VanOmeron v. Dowick*, 2 Camp. 44; *Attorney General v. Theakstone*, 8 Price 89; *Rex v. Picton*, 3 How. St. Tr. 493; *Regina v. Levi*, 12 L. T. Rep. N. S. 502, 10 Cox C. C. 110; *Regina v. Wallace*, 14 W. R. 462; *Taylor v. Parry*, 1 M. & G. 619, 622. The defendants rely upon the Statute of the Dominion Parliament, 31 Vic. ch. 19, sec. 6, to prove that the agreement had been duly accepted; but this is a mere private Act, and the recitals in it are not evidence as against strangers: *The King v. Sutton*, 4 M. & Sel. 532; *Rex v. Greene*, 6 A. & E. 548; *The Queen v. The Inhabitants of Haughton*, 1 E. & B. 501; *The Earl of Carnarvon v. Villebois*, 13 M. & W. 313; *Brett v. Beales*, M. & M. 421; *Bal-lard v. Way*, 1 M. & W. 529; *The Duke of Beaufort v. Smith*, Ex. 450, 470. The effect of the agreement is to constitute a partnership between the two companies. There has been no amalgamation or merger; each company has still a separate corporate existence: *Cayley v. Cobourg, &c. R. W. Co.*, 14 Grant, 571. If there be a partnership, then there is a mere non-joinder of parties, which the defendants cannot take advantage of; and there is nothing whatever, either in the agreement or in the evidence, to relieve the defendants from responsibility. The private acts of the defendants imposed the obligation on them to maintain the fences along their roadway, and nothing has been shewn to relieve them from the responsibility.

McMichael, for the respondents. The declaration does not allege the duty to keep the fences as a burden imposed by Statute, but as a charge at common law. The plea, even if it be considered as an ordinary plea of not guilty, and not as pleaded by Statute, is sufficient for the defendants;—for the inducement is not admitted, because it is not alleged the defendants were owners of the railway, &c., at the time when, &c., and without saying so it is a mere idle statement—*Mitchell v. Crassweller*, 13 C. B. 237. But

the plea is properly pleaded by Statute, and the defendants are enabled to make use of the 29-30 Vic. ch. 92, although it has not been stated in the margin. The engine and train that killed the horse are not averred to have been the engine and train of the defendants, or under their control; and as a fact they were proved not to have been the defendants' property, or under their care. The general issue was rightly pleaded under Consol. Stat. C. ch. 66, sec. 83, for that section is not confined to acts of misfeasance; the language is, that "all suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted," &c.: *Auger v. The Ontario, Simcoe, &c., R. W. Co.*, 9 C. P. 165. The Court will take judicial notice of the Act 29-30 Vic., ch. 92, and of what has been done under it, without the production of the *Gazette*, and also of the Act 31 Vic. ch. 19, to establish the fact of the agreement having been accepted by the shareholders. *The King v. Greene*, 6 A. & E. 548, shews that a private Statute, though not conclusive, may be *prima facie* evidence of a particular fact. The effect of the agreement and of the Acts of Parliament has been to transfer the absolute control of the railway and the working of it to the Grand Trunk R. W. Co., and to impose on them, as a consequence, the duty of maintaining the road and the line fences; and it follows they must alone be responsible for any negligence, either by omission or commission, to those who sustain damage.

Harrison, Q.C., in reply. The mere allegation of duty is sufficient, without shewing how that duty attached. The case of *Ayles v. The South Eastern R. W. Co.*, 37 L. J. Ex. 104, S. C. L. R. 3 Ex. 146, shews the wrong done will be presumed to have been done by the cars of the defendants, and that the cars were under their control, if it happened on their road. He also referred to *Reist v. The Grand Trunk R. W. Co.*, 15 U. C. R. 364; *Prendergast v. The Grand Trunk R. W. Co.*, 25 U. C. R. 193; *McGillivray v. Great Western R. W. Co.*, 25 U. C. R. 69; *Brown v. Grand Trunk R. W. Co.*, 24 U. C. R. 350.

ADAM WILSON, J., delivered the judgment of the Court.

The defendants were incorporated by the Act of 19 Vic., ch. 21 ; they were constituted for the purpose of purchasing the line which had been commenced by a previous company, and of finishing the work they had left undone. By sec. 33 of the Act, among other clauses of the General Railway Act which are incorporated with the special Act, are those relating to fences.

"*The Railway Act*," Consol. Stat. C. ch. 66, sec. 13, requires that "fences shall be erected and maintained on each side of the railway, of the height and strength of an ordinary division fence." By sec. 15, until such fences are made, the Company shall be liable for all damages which may be done by their trains or engines to cattle or other animals on the railway. Sec. 16, enacts that after the fences have been made, and while they are duly maintained, no such liability shall accrue for any such damages, unless negligently or wilfully done.

The defendants were, therefore, before the passing of the 29-30 Vic., ch. 92, bound to erect and maintain the fences along their line, and they were liable for all damage happening on their railway by reason of the want or of the insufficiency of fences. By this latter Act the agreement set out in it, and made between the defendants and the Grand Trunk Railway Company, was confirmed ; and the principal question is, whether, under or by reason of this agreement or of the Statute, the responsibility with respect to fences has been assumed by a transference to the Grand Trunk Railway Company.

Some preliminary questions have been raised and discussed, which must first be settled. It is said the general issue, which has been pleaded, though specifying the Act of Canada, ch. 66, sec. 83, which permits the general issue to be pleaded, is not available as a special plea, because the defence which the defendants set up is under the 29-30 Vic., ch. 92, by which, as they contend, the road and the responsibilities of it have been transferred from them to the Grand Trunk, and they have not put that Act in the margin of their plea.

The rule is, that, "In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence by virtue of an Act of Parliament, he shall insert in the margin of the plea the words 'by Statute,' together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such Acts are public or otherwise,—otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament." R. 21. T. T. 1856.

Have the defendants, then, inserted in the margin of their plea the Act or Acts of Parliament upon which they rely for the purpose of enabling them to give the special matter in evidence?

They have pleaded the general issue, by Statute, Consol. Stat. C. ch. 66, sec. 83, intending to give the special matter in evidence by virtue of an Act or Acts of Parliament.

Must the defendants, besides stating the Statute which gives them the general issue, refer also to the Statute or Statutes under which they are enabled to justify or excuse themselves from liability?

The case of *Edwards v. Hodges* (15 C. B. 477), shews that all the Statutes relied upon for a defence must be referred to, just as they would have been pleaded in case the defendants had been obliged to have pleaded specially.

In this case, Consol. Stat. C. ch. 66, sec. 83, gives the plea. The special matter arises under the 29-30 Vic. ch. 92. Without a reference to this Statute, it was impossible the plaintiff could tell how or in what way, or for what object, the defendants were using that plea; but by a reference to that Act the plaintiff would be fully informed beforehand, and prepared to meet it at the trial.

We think it was necessary the Act in question should have been stated in the margin of the plea, and therefore the defence which was put forward at the trial, and on which defendants have succeeded, was not admissible.

If, however, there is the power to amend here, as there certainly was at the trial and in the Court below, the amendment should even now be made, as the parties went to trial and have conducted the case throughout with the object of determining the real question in controversy, whether these defendants are or are not liable for the default and damage alleged and sustained.

This Court has the power to give such order or direction to the County Court touching the judgment to be given in the matter as the law requires, and the County Court is obliged, on receipt of such order, to proceed in accordance therewith.

We do not here make the amendment, and perhaps we might not be able to make it. If the original proceedings are here, we might amend them, but the Statute does not very clearly require them to be sent. It says, (Consol. Stat. U. C. ch. 15, sec. 68,) at the request of the party appellant, the Judge of the Court appealed from shall certify under his hand the pleadings in the cause, and all motions, &c., together with his own charge, &c., and the evidence, and all objections thereto.

The original charge of the Judge is not to be sent, nor the original evidence, nor the original objections to it, all of which are contained in his note-book. They may be certified by copies being sent, and so in like manner may the pleadings. It is not advisable to transmit original documents unless it be actually necessary, and there is no necessity for it so long as the Superior Court is not to pronounce judgment, but really to direct what judgment shall be given by the Court below.

If the original proceedings are in fact here, we may amend them; if they are not here, we may order them to be amended under the Statute; and perhaps this may be the best course to adopt, although the proceedings are here, for the Statute apparently contemplates the Judge of the Court below giving the judgment and doing all other necessary acts under the direction of the Superior Court.

There is not the difficulty in the way of amendment here that there was in *Wilkinson v. Sharland* (11 Ex. 33.)

The amendment should be directed to be made, if it is found necessary to make it, and upon payment of costs for the neglect of the defendants to plead the Statute in the first instance, or to amend it at the trial, or in the term after when the rule *nisi* was discussed, and for the trouble they have occasioned by such omission to the present time.

The defendants are right in their contention that the inducement of the declaration is not admitted by the plea, considering it as the ordinary general issue, and not as pleaded by Statute, because, the inducement not alleging the defendants were proprietors of the railway at the time when the negligence happened, the averment of duty dependent on such previous statement is as indefinite as it is with respect to the time itself. The case of *Mitchell v. Crassweller*, (13 C. B. 237) which was referred to, explains this.

The declaration must therefore be read in this way: That the defendants having at some time been proprietors of the railway, they were at such time bound to erect and maintain fences: that not regarding their duty they did not erect and maintain such fences; by reason whereof the plaintiff's horse strayed on to the railway and was killed.

The want of specific time involving the question of duty at the time complained of may, perhaps, on the whole declaration not be objectionable, but it must cast on the plaintiff the burden of proving the duty which he says there was on the defendants, to provide and maintain fences at the time when the injury happened, instead of putting it upon the defendants to traverse it, if they wished to dispute it, and which they would have had to do if it had been properly laid.

The plea as it stands is therefore sufficient, in our opinion, to raise the real question in controversy—which of these companies are bound to erect and maintain the fences.

It may be presumed the train was that of the defendants, and under their control, if the road was in their possession, unless the contrary be shewn.

Then it was argued that the formalities of the 29-30

Vic. ch. 92, had not been proved at the trial to have been complied with, and therefore it could not be shewn the transfer of the road had ever been made by the defendants to the Grand Trunk Railway Company under the Act.

The Statute declares, sec. 7 : " This Act shall not come into operation until accepted by a majority of two-thirds in value of the bondholders and shareholders of the Grand Trunk Railway Company of Canada, present in person or by proxy, and voting at a special general meeting to be called in the usual manner for that purpose, and by a majority of the shareholders of the Buffalo and Lake Huron Railway Company, present in person or by proxy, and voting at a special or general meeting of the said shareholders called for that purpose, the said meetings respectively to be called and held before the first day of January, now next, in the City of London, England." And the 8th section provides that " The acceptance of this Act in manner aforesaid shall be respectively certified under the respective corporate seals of the said railway companies, which shall be filed in the office of the Provincial Secretary of Canada; and compliance with the formalities in this section prescribed, and the said acceptance of this Act, shall be conclusively established by the insertion in the *Canada Gazette* of a notice to that effect by the Provincial Secretary, and such last mentioned notice shall be taken in all proceedings, and in all courts of law or equity, as sufficient *prima facie* evidence of the contents thereof, and that this Act has been accepted by the said railway companies, and that the same has from the date of such certificate come into full effect and operation."

The defendants contended that the Act of the Dominion of Canada, intituled " An Act to amend the Grand Trunk Arrangements Act, 1862, and for other purposes," being the 31 Vic. ch. 19, sec. 6, shewed the preceding Act had been fully accepted. That section recites the agreement that was made, and the Statute that was passed to give it effect, and it recites also that " meetings of the shareholders of the respective companies have since been held,

which have duly accepted the same," and power is then conferred on the companies to alter the agreement. And the defendants also contended that this recital in the Statute was admissible in evidence for that purpose.

The plaintiff's counsel contended that nothing but the production of the *Gazette* would prove the acceptance of the Act, and that the last mentioned Statute, being a merely private Act, was not evidence of any fact contained in it as against the plaintiff, a stranger to it. The Dominion Act 31 Vic. ch. 19, is only a private Act, and the recitals in or the provisions of it cannot bind or affect strangers.

But the recital contained in section 6 is evidence as between these two companies, and that which is sufficient between them must be sufficient also in a case where their rights are concerned on the one hand, and the right of a stranger on the other hand. If they are concluded from disputing these facts, there must be a *primâ facie* case at any rate against both and each of them in such a proceeding as this. The *Gazette*, no doubt, would be evidence, under the express enactment, of the formalities having been complied with and the Act accepted, either conclusive or *primâ facie*; but this is not made the sole method of proving these facts. If the Act had contained no such provision, these matters might have been proved in the ordinary manner. The statute gives an additional not an exclusive mode of proof. In the absence of the *Gazette*, the question is, was the evidence that was produced sufficient to prove these matters.

The agreement is dated the 7th of July, 1864; the Statute confirming it was passed on the 15th of August, 1866. The meeting of shareholders at which the acceptance or refusal was to be determined, was required to be held before the 1st of January, 1867; and the accident happened on the 20th October, 1867.

The following evidence was given on this point at the trial by the plaintiff's witnesses :—*Francis Hicks* stated that he believed the railway was owned by the Grand

Trunk. The cars were lettered G. T. R. Many people sell wood to, and they believe they deal with the Grand Trunk. *Abraham Honsberger* stated that the railway was supposed to belong to the Grand Trunk; he had worked on it since May, 1866, and was paid his wages by the Grand Trunk; pay lists were made out in the name of the Grand Trunk; the tools used on the road were marked B. & L. H.; the only cars marked B. & L. H. are the old cars; the new ones are marked Grand Trunk Railway. *John Bowman* said, it is generally understood the Grand Trunk Railway Company runs the road.

We think that on these facts, taken in connection with the 31 Vic. ch. 19, which was receivable and was entitled to some weight, or even taken without it, there was evidence to go to the jury from which a compliance with the formalities of the Act and an acceptance of it by the shareholders might have been presumed.

The last and material question is, which of these companies was at the time of the accident bound to maintain the line of fence along each side of the railway? This must be determined by the agreement, and by the Statute which confirmed it, and by the general rules of law which are applicable to it.

The agreement provides, that from the day on which the working of the Buffalo and Lake Huron Railway Company shall be undertaken by the Grand Trunk Railway, the net receipts of the two undertakings shall be divided between the two companies, after deductions of amounts expended for renewal of rails, &c., in the following proportions, &c.

Any additional capital required for the purchase of stock, or for new works in connection with through traffic of the two lines, shall be raised and applied by and under the joint committee, consisting of two nominees from the board of each company.

The Grand Trunk to have the option at any time within six years, on assuming all the obligations and liabilities, whether fixed or guaranteed, of the Buffalo and Lake Huron Company, to purchase for £660,000 the whole of the ordinary share capital of the latter company.

The control and working of the Buffalo and Lake Huron undertaking shall, from the time of its being handed over as aforesaid to the Grand Trunk, be placed in the hands of the Grand Trunk under the joint committee as aforesaid.

The agreement to subsist for twenty-one years. During the term the Buffalo and Lake Huron Railway and its appurtenances shall be maintained and kept in a good and efficient state as to repairs, renewals, the supply of rolling stock, and generally, and shall be delivered up in such state at the end or other sooner determination of the said term of twenty-one years.

Section 3 of the confirmation Act provides that the Grand Trunk in working the Buffalo & Lake Huron Railway, shall have the right to use, exercise and enjoy all the rights, powers, privileges, immunities, and other the premises created or conferred upon the Buffalo & Lake Huron Company, by all Acts of Parliament relating to such company or otherwise.

It is plain from this abstract—1. That the Buffalo & Lake Huron Railway is to be handed over to and placed in the hands of the Grand Trunk, who are to work the same. 2. That the control and working of the Buffalo & Lake Huron undertaking is to be assumed by the Grand Trunk, and is to be carried on under the joint committee. 3. That during the term of twenty-one years the Grand Trunk shall maintain and keep in a good and efficient state of repair the Buffalo and Lake Huron Railway, and its appurtenances; and 4, That the Grand Trunk shall have all the rights in working the line which the Buffalo & Lake Huron Company had.

The common law requires no one to fence. "The general rule of law is, that I am bound to take care that my beasts do not trespass on the land of my neighbor, and he is only bound to take care that his cattle do not wander from his land, and trespass on mine": (1 Wms. Saund. 322 *a*, note). *Churchill v. Evans*, (1 Taunt. 529. The costs of maintaining fences lies on the actual occupier, when there is an

obligation to fence, and not on the owner of the inheritance: *Cheetham v. Hampson* (4 T. R. 318).

It is part of the implied duty of every tenant to repair fences, and he may take wood for that purpose off the demised premises without assignment: *Whitfield v. Weedon* (2 Chit. Rep. 685).

The landlord may, without any agreement by the tenant to repair, maintain an action against him for non-repair of fences, upon the ground of injury done to the inheritance: *Cheetham v. Hampson* (4 T. R. 318).

And the obligation may be said to be in respect of occupation, although it is evidenced by a deed: *Boyle v. Tamlyn* (6 B. & C. 329.)

The duty to fence, which is imposed on a railway company, is not more extensive than is cast upon ordinary tenants by the common law: *Ricketts v. The East and West India Docks, &c., R. W. Co.* (12 C. B. 160).

These defendants are not occupiers of this railway; and, in the consideration of this question as to fencing, it is of no consequence whether the *locus in quo* is used for a railway or a farm. They are owners of the inheritance; and whether the Grand Trunk Railway Company are strictly tenants of the roadway, and the defendants are their landlords—that is, whether the agreement and Statute constitute a lease—we need not determine, although, if it were necessary to decide it, I should say they did. It is sufficient for this case that the roadway, with other property of the Buffalo & Lake Huron Railway Company, have been delivered over by agreement, and by authority of Parliament, and have been taken possession of, and are worked, used, occupied and possessed by the Grand Trunk Railway Company for a period of twenty-one years; and by the rules of law, such a possession carries along with it the burden and obligation on the occupier of maintaining fences, when there is a duty to fence at all.

There is, moreover, in this agreement a special engagement by the Grand Trunk to maintain and keep the railway and its appurtenances in a good and efficient state

of repair, which will certainly extend to the fences, and they are bound to deliver up all such property in good order at the expiration of the term.

This opinion is not necessarily inconsistent with the decision of *Bennett v. Covert* (24 U. C. R. 38), for the facts of this are not precisely similar to those in that case.

In our opinion the appeal should be dismissed with costs.

Appeal dismissed (a).

HOLMES V. THE GRAND TRUNK RAILWAY COMPANY OF
CANADA.

Liability to keep up fences.

Held, following the last case, that the Grand Trunk Railway Company, under the agreement with the Buffalo and Lake Huron Railway Company confirmed by 29-30 Vic. ch. 92, were liable for not keeping up the fences along the latter railway.

This was a special case, founded upon an action commenced in the County Court of Huron, and upon the evidence taken in that cause.

It was an action against the defendants, who were alleged to be owners, proprietors and occupiers of a railway, extending from Fort Erie to Goderich, (The Buffalo and Lake Huron Railway) for not fencing the line, by reason of which the plaintiff's horse got on the roadway and was killed by a passing train.

At the trial in the County Court, after the evidence had been taken, a bill of exceptions was tendered by defendants; and it was afterwards agreed that the pleadings and evidence should be made a special case for the opinion of this Court, \$125 being fixed as the amount of damages in case judgment should be for the plaintiff.

The question was, whether defendants were liable for not maintaining the fences, it being contended that the Buffalo and Lake Huron R. W. Co. were the only parties responsible.

(a) See *McCallum v. Buffalo and Lake Huron R. W. Co.*, 19 C. P. 117.

Robinson, Q.C., for the plaintiffs, advanced the like argument as in *VanNatter v. The Buffalo and Lake Huron Railway Company*, ante p. 581, and he also contended there was a partnership between the two companies, and that they were both liable. He referred to 29-30 Vic. ch. 92; *Broom's Legal Maxims*, 3rd ed. 630-2, "*Qui sentit commodum sentire debet et onus*;" *Lindley on Partnership*, 2nd ed. 18, 19; *Bennett v. Covert*, 24 U. C. R. 38; *Great Western Railway Company v. Blake*, 7 H. & N. 987; *Buxton v. North Eastern Railway Company*, L. R. 3 Q. B. 549. [RICHARDS, C. J., referred to *Bullen v. Sharp*, L. R. 1 C. P. 86].

C. S. Patterson, contra. The lessee of a railway is not liable to keep up fences: *Bennett v. Covert*, 24 U. C. R. 38; and there too the lease of the road had been confirmed and sanctioned by Act of Parliament, 27 Vic. ch. 60. He referred also to *Hamilton v. Covert*, 16 C. P. 205.

There was no partnership between the two companies, although the net profits were to be divided between them in a certain proportion.

ADAM WILSON, J., delivered the judgment of the Court.

The decision in the case of *Van Natter v. The Buffalo and Lake Huron Railway Company*, that the latter company are not liable for accidents happening by defect of railway fences, must dispose of this case too. The decision must be against the defendants in this suit, for it is manifest one company or the other must be liable; and we are of opinion that it is the defendants who are liable, by reason of their occupation and possession of the line and of the whole works and property of the other company, and by reason of their working it, and the obligation they are under to maintain the railway and the appurtenances.

We think there is not a partnership between the companies.

Our judgment is in favor of the plaintiff.

Judgment for plaintiff.

SHERIFF V. MCCOY.

Express contract—Fraud—Right to sue on common counts—Appeal—Practice.

To an action on the common counts for goods sold, defendant pleaded that at the time of the sale the plaintiff agreed to and did receive in payment therefor two promissory notes made by one M. The plaintiff replied that he was induced to receive these notes by fraud (setting out defendant's fraudulent representations respecting them). The facts as stated in the pleadings being admitted by the plaintiff's counsel:

Held, affirming the judgment of the County Court, that the plaintiff could not recover; for, there being an express contract, defendant's fraud could not create an implied one, though it would entitle the plaintiff to recover back the goods, or maintain a special action for the deceit.

There was also a demurrer to the replication, and a verdict had been directed for defendant on the plaintiff's opening, from which the plaintiff appealed. Remarks as to the inconvenience of an appeal under such circumstances.

APPEAL from the County Court of Kent.

Declaration on the common counts, for goods bargained and sold, money paid, &c.

The particulars were for one buggy and iron axle tree waggon, \$190, and for amount paid for defendant to one Anne Sheriff, \$8.40.

Defendant pleaded never indebted; and a special plea, that at the time the plaintiff sold to the defendant the said goods, being a buggy and waggon, and before the action, the plaintiff agreed to receive from the defendant two promissory notes, amounting to, to wit, \$200, made by one Merritt, payable to the defendant, in payment therefor, and for the like consideration agreed to pay to Anne Sheriff, administratrix of John Sheriff deceased, a small debt of \$8.40, which the defendant owed to the said Anne Sheriff as such administratrix; and the plaintiff thereupon delivered the said goods to the defendant, and paid the said debt to the said Anne Sheriff, and the defendant on his part delivered to the plaintiff and the plaintiff accepted and received the said promissory notes from the defendant, in full satisfaction and discharge of the plaintiff's claim.

There was also a general plea of accord and satisfaction.

The plaintiff replied to the second plea, that he was induced to receive the said promissory notes made by one James Merritt from the defendant, by the fraudulent representations of the defendant that such notes were made by a certain James Merritt, a well-known farmer residing near the village of Louisville, in the township of Chatham and county of Kent, and that such James Merritt was the owner of a farm near the village of Louisville, and was a responsible person, and that such notes were given by the said James Merritt to the defendant upon a certain land trade made between defendant and said James Merritt. And the plaintiff avers that the defendant's representations of such notes, and of the maker thereof, and of the consideration for the same, were false, and that the defendant knew the same to be false at the time he so made the same, and that the said notes were made by a certain other James Merritt, an irresponsible person not residing near the said village of Louisville, who has not paid the same, or either of them, or any part thereof, although the same were past due before the commencement of this action, and that the said notes were worthless and of no value. And within a reasonable time after he had notice of such fraud, and before he had received any benefit from the said notes, he repudiated the same, and the receipt thereof by him, and refused to have or retain the same in payment for the said buggy, waggon, and amount paid said Anne Sheriff for defendant, and the causes of action in respect thereof, or any part thereof, and gave notice thereof to the defendant, and tendered and offered to deliver back the same to the defendant, and the plaintiff now holds the same for the defendant. There was a similar replication to the third plea.

The defendant joined issue on and also demurred to the replications.

At the trial, as certified in the learned Judge's report, "Mr. Douglas, counsel for the plaintiff, opened, and stated facts as set forth in the pleadings, alleging exchange of property, the plaintiff accepting the notes on the repre-

sentations of the defendant, as they are set forth in the plaintiff's replications.

"I rule that defendant is entitled to a verdict on this opening, with leave to the plaintiff to move to enter a verdict for him for \$198.40, if the Court should be of opinion this action is properly brought."

A rule *nisi* was obtained to enter the verdict for the plaintiff, and, after argument, was discharged. The learned Judge said, in disposing of the rule :—"There was not any promise to pay on the part of the defendant, but an immediate payment or exchange, or accord. Assumpsit can only be brought on an express or implied contract. In *Selway v. Fogg*, 5 M. & W. 83, it is said no one can be liable on an implied contract when he has made a specific contract avoided by fraud. In *Noble v. Adams*, 7 Taunt. 59, it is laid down that the obtaining goods under false pretences does not change the property. In *Hawse v. Crowe*, R. & M. 414, it is further stated, that property does not pass where a check is given for property, and the person giving the check knows it is not good or of any value. This is not one of the cases in which the tort can be waived and assumpsit brought. I think the action not properly brought, and the verdict must stand."

From this judgment the plaintiff appealed.

Harrison, Q.C., for the appellant. The goods having been got by fraud entitles the plaintiff to sue for the price of them : *Davis v. Marshall*, 7 Jur. N. S. 1247 ; *Brine v. Great Western R. W. Co.*, 8 Jur. N. S. 410 ; *Rixson v. Emery*, L. R. 3 C. P. 546. There is no objection that the period of credit had not expired when the action was brought, which was the difficulty that existed in several cases, for the notes were overdue before the commencement of this suit : *Wakefield v. Gorrie*, 5 U. C. R. 159 ; *Silliman v. McLean*, 13 U. C. R. 544 ; *Rugg v. Weir*, 16 C. B. N. S. 471. This was like the case of a person by fraud procuring another to sell to a third person on a representation that the third person was able to pay, while he was not,

and the person making the representation knew it, and had resorted to this scheme for the purpose of getting the goods into his own hands: *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; *Abbotts v. Barry*, 2 B. & B. 369. He also cited *Ferguson v. Carrington*, 9 B. & C. 59.

Robinson, Q. C., and *Atkinson*, contra. The facts in the plea shew an exchange, not a sale. The plaintiff cannot convert the defendant into a purchaser who was to pay cash, when the agreement was to receive the two promissory notes in lieu of the goods that were given.—*Chitty* on Contracts, 8th ed. 62-3, 363; *Ferguson v. Carrington*, 9 B. & C. 58; *Selway v. Fogg*, 5 M. & W. 83; *Bradbury v. Anderton*, 1 C. M. & R. 490, S. C. 5 Tyr. 152. The plea of never indebted was sufficient to let in this defence—*Bussey v. Barnett*, 9 M. & W. 312; *Littlechild v. Banks*, 7 Q. B. 739; *Smith v. Winter*, 12 C. B. 487. Obtaining goods by fraud does not change the property.—*Noble v. Adams*, 7 Taunt. 59. And the party selling goods may recover them again if he choose—*Campbell v. Fleming* 1 A. & E. 40; *Sheppard v. Shoolbred*, 1 Car. & M. 61; *Stevenson v. Newnham*, 13 C. B. 302; *Payne v. Whale*, 7 East 274.

ADAM WILSON, J., delivered the judgment of the Court.

We were in doubt whether to proceed in this case, or to remit it back to the Court below with a direction that the rule should be made absolute setting aside the verdict for the defendant, and granting a new trial.

It is not at all satisfactory to nonsuit or order a verdict to be entered on the opening address of counsel, unless it is perfectly understood that the facts he has stated are assented to by both parties as true.

In this case we have no assurance that this is so. The defendant, we presume, does not admit the truth of the replication: he intends to have it tried; and if it had been tried and found upon, we could have dealt then with the case upon the facts as definitively settled by the verdict.

In this case also the replications are demurred to. No judgment has been given upon them, and the appeal to us

is really to determine whether the demurrer should or should not be deemed sufficient, although it is not formally before us.

We think it right to notice this state of the record, that parties may avoid appealing for the future under the like circumstances.

We will give an opinion in this instance, because it may be that it may determine the litigation, and because the parties have incurred a good deal of expense, and have allowed this suit to get into its present unsatisfactory state, without considering how far they might be prejudiced by it on an appeal.

The general question is, whether, assuming the plea and the replications to be both true, the plaintiff can maintain this action of assumpsit for goods bargained and sold, and for money paid; and our answer to it is, that he cannot.

In *Ferguson v. Carrington* (9 B & C. 59) it was held that the defendant having got goods on credit fraudulently, intending never to pay for them, the plaintiff could not sue in assumpsit before the credit expired, because if he affirmed the contract he must adopt the whole of its terms, and allow the credit agreed upon; but he might repudiate the contract, and sue in trover for the goods, upon discovering the fraud, although the credit had not elapsed. There was an express contract, to give credit, and the action was to make the defendant pay cash at once; but Bayley, J. said, "Where there is an express contract the law will not imply one."

The authorities above cited are uniform, and fully establish the rule and principle.

The cases which have been referred to, where one has procured a party to sell goods by fraud to a third party, with a view of getting these goods into his own possession, knowing the nominal purchaser could never pay for them, and, he, the fraudulent party, has been treated as himself the purchaser of the goods in law, have no application here. In these cases the vendor has been enforcing the contract he made; that is, he is suing for goods he actually sold,

and on the terms of the sale, and he is suing the person for whom, in fact, they were got.

But in this case the plaintiff is attempting to make a contract for the sale of goods, when no such sale was ever made in fact or in law, and when the defendant never promised to pay cash. He is not without remedy, for he may sue for the fraud in an action on the case, or in trover for the goods he parted with.

The case of *Davis v. Marshall* (7 Jur. N. S. 1247) relied on by the plaintiff's counsel, supports this doctrine. There the plaintiff sued for obstructing his light. The defendant pleaded assent of the plaintiff to the defendant putting up the buildings which obstructed the light. The plaintiff replied fraud on the part of the defendant, by representing that the building he proposed to put up would not do the mischief which the building when put up actually did; and it was held this was a good replication. The effect of it was to remit the plaintiff to his original rights. And so here, the effect of the defendant's fraud was to remit the plaintiff, on his repudiating the bargain, to his original rights, which rights were to recover back his buggy and waggon, but not to sue as for goods sold for cash, for he never had such a right at any time. And the fraud also gave to the plaintiff a cause of action for the damage he had sustained by reason of it, in a special action on the case.

Perhaps a question might be made in favour of this action, if it were proved that the plaintiff took these notes as cash, just as he might a check or a bank note. But all difficulty would have been avoided if the plaintiff had applied for leave to have added a count in trover, and it is not too late to do so yet.

This suit should, if possible, have been made by the Court to terminate the rights and controversies of the parties. It is too late, or, rather, it is hardly worth while, to add the count in trover now. The party may as well begin his suit afresh, after the loss of considerably more than half of his demand.

We are obliged to dismiss the appeal.

Appeal dismissed.

MCLEAN AND THE CORPORATION OF THE TOWN OF ST. CATHARINES.

*Municipal corporations—Markets—29-30 Vic. ch. 51, sec. 296. sub-sec. 12—
31 Vic. ch. 30, sec. 32.*

The corporation of a town by by-law enacted that no butcher, huckster, or runner, should buy or contract for any kind of fresh meat, provisions, &c., such as were usually sold in the market, on the roads, streets, or any place within the town, or within one mile distant therefrom, between certain hours in the day :

Held, clearly unauthorized, for their power (under 29-30 Vic. ch. 57, sec. 296, sub-sec. 12, as amended by 31 Vic. ch. 30, sec. 32), extends only to butchers living in the town or within a mile of its limits.

The rule *nisi* to quash the by-law was entitled "In the matter of — appelland and — respondent:" *Held*, no objection.

James Miller obtained a rule calling on the corporation of the town of St. Catharines to shew cause why the second section of their by-law, passed on the 15th April, 1868, entitled a by-law to amend by-law No. 20, relating to the market of the town of St. Catharines, should not be quashed with costs, upon the ground that the corporation had no power to restrain the buying of or contracting for the articles in the said second section mentioned, in the manner therein stated, by all or any of the persons at the places therein stated.

In support of the application the affidavit filed was entitled in this court, and In the matter of *James McLean*, appelland, and *The Corporation of the Town of St. Catharines*, respondents.

The second section of the by-law in question enacted that no butcher, huckster or runner should buy or contract for any kind of fresh meat, provisions, eggs, and all articles required for family use, and such as are usually sold in the market, on the roads, streets, or any place within the town, or within one mile distant from the outer limits thereof, on any day before the hour of nine o'clock, A. M., between the first days of April and November, or before the hour of ten o'clock, A. M., on any day during the remainder of the year.

Harrison, Q. C., shewed cause, referring to *Fennell* and *The Corporation of Guelph*, 24 U. C. R. 238; and he took a preliminary objection that the affidavit was improperly entitled as in a cause, and styling the applicant appellant and the corporation as respondent.

Kerr supported the rule.

MORRISON, J., delivered the judgment of the Court.

As to the preliminary objection, the case of *Hargreaves v. Hayes* (5 E. & B. 272), followed by the judgment of our Court of Common pleas in *Re Burrowes* (18 C. P. 502), disposes of the first branch of the objection, and the case of *In re Imeson* and *Horner* (8 Dowl. 651), shews that words such as appellant and respondent may be treated as surplusage.

Then as to the by-law in question, there can be no doubt that the corporation has exceeded its powers. The authority under which the municipality assumed to act is contained in the 296th section of 29-30 Vic. ch. 51. Sub-sec. 12 of that clause, as amended by 31 Vic. ch. 30, sec. 32, enacts, that the council of any town, &c., may pass a by-law "for preventing and regulating the purchase of such things" (those mentioned in the preceding sub-sections, and which are the articles referred to in the by-law in question), "by hucksters, butchers or runners *living* within the municipality, or within one mile from the outer limits thereof."

It is quite clear from the language used that sub-sec. 12 applies, and was only intended to apply, to butchers, &c., residing in the town or within a mile from its limits, and purchasing within the limits of the town, and not, as assumed by the framers of this by-law, to apply to any butcher, &c., whether a resident of the town or elsewhere, buying or contracting for any of the things referred to within a mile of the town. Such a by-law is quite inconsistent with the rights and jurisdiction of the neighbouring municipality.

One can understand the Legislature having in view

butchers, &c., living within a mile of cities and towns, who may deal in the articles mentioned in the Statute, or purchase them within the limits of such corporations, and in such case giving authority, as they have done, to the councils of cities and towns to regulate the purchasing within their limits by such non-residents in common with the butchers, &c., residing therein; but that is quite a different thing from authorizing the making of by-laws to prevent and regulate the purchasing of articles outside of the limits of the city or town by persons living in the adjacent and other municipalities, all of which this by-law assumes to do, for its provisions are wide enough to embrace hucksters, &c., living in the city of Toronto buying and contracting for any of the things enumerated within a mile of St. Catharines.

Rule absolute, with costs.

FITZGERALD ET AL V. THE LONDON CO-OPERATIVE ASSOCIATION, (LIMITED).

Co-operative associations—29 Vic. ch. 22, sec. 14—Sale to, not for cash—Pleading.

The plaintiffs supplied goods to a co-operative association, formed under 29 Vic. ch. 22, on the order of their manager. The terms of purchase were said to be cash, but it appeared that according to the course of dealing between the parties, before payment the invoices were laid before a board meeting, and if found correct the treasurer was ordered to pay. These goods were ordered in January, and not paid for, and in July the plaintiffs sued.

Held, not a cash transaction within the 14th section of the act, and that the plaintiffs could not recover.

Semble, that the defence should have been specially pleaded, and the plea was allowed to be added.

ACTION for goods sold and delivered, and on the usual common counts.

Plea, never indebted.

On the trial, before Adam Wilson, J., at the last London Assizes, it appeared, from the evidence given on the part of

the plaintiffs, that the defendants were an association established under the provisions of the 29 Vic. ch. 22, for the sale by retail of groceries, &c; and that the action was brought for the recovery of \$895.80, being the amount of several invoices of goods, groceries, purchased by the manager of defendants' association. It appeared also that the defendants had previously purchased goods from the plaintiff and paid for them: that the terms on which the goods in question were sold and purchased were cash, and the practice or dealing between the parties appeared to be, that before payment the invoices were laid before a board meeting of the trustees, and if found correct were checked, and the amount ordered to be paid by the treasurer. It also appeared that thirty days credit by the custom of the trade was a cash transaction, but that such credit was not claimed. The goods were sold and delivered in the month of January, 1868, and this action commenced in the following July.

No witnesses were called on the part of the defendants, and the defendants' counsel submitted that the plaintiffs could not recover.

The learned Judge nonsuited the plaintiffs, being of opinion that the purchases were not cash transactions: that although it was sworn the purchase was for cash, it was understood the payment was not to be made by defendants until the invoices were rendered by the plaintiffs, and until defendants had a board meeting and approved of them, or checked them, when they were paid, and some days would elapse between the purchase and the payment.

Leave was reserved to the plaintiffs to move to enter a verdict for them for the \$895.80, the Court to make such further order as it might be advised, or might be necessary for determining the question between the parties.

Becher, Q. C., obtained a rule *nisi* to set aside nonsuit, and to enter a verdict for the plaintiffs for \$895.80, or why such other order as the Court should decide upon the law pleadings and evidence should not be made, pursuant to the leave reserved at the trial.

Harrison, Q. C., shewed cause, citing *Bussey v. Barnett*,

9 M. & W. 322 ; *Littlechild v. Banks*, 7 Q. & B. 739 ; *Smith v. Winter*, 12 C. B. 487 ; *Wood v. Bletcher*, 4 W. R. 566.

Becher, Q. C., supported the rule, and cited B. & L. Prec. 481 ; *Curteis v. The Anchor Insurance Co.*, 2 H. & N. 537 ; *Payne v. Mayor, &c., of Brecon*, 3 H. & N. 572.

MORRISON, J. delivered the judgment of the Court.

We are all of opinion that this rule should be discharged. The 14th section of the statute under which the defendants were established as an association, enacts, that "the business of the association shall be a cash business exclusively ; no credit shall be either given or taken, and no officer, member or servant of the association, or any number of them together, shall have power to contract any debt whatever in its name, except in respect of rent of the premises required for the business, the salary of clerks and servants, and such like contracts, necessary in the management of the affairs of the society ; everything shall be bought and sold for cash only."

The language of this section unmistakeably indicates the intention and determination of the Legislature to deprive such association of the power of contracting or creating any debt whatever, rendering them incapable of incurring any liability except in the cases specially excepted. The 12th section makes ample provision for publicity of the character of these associations, for the purpose of putting parties transacting business with them on enquiry as to their powers and liabilities. And the 14th section is a *caveat venditor*, that in dealings like the one in question, before delivery of the goods there must be either prepayment or the delivery and payment must be simultaneous : that if the vendor parts with his goods, no matter what the terms upon which they were sold, whether relying on the word or honour of the officers of the association or its trustees, or otherwise, the party has no remedy as for a debt or breach of contract against the association.

It was strongly pressed upon us by Mr. Becher that it

was monstrous to permit these defendants, when buying for cash through their officers, and receiving the goods on those terms, and who for the purpose of complying with some rules of their own required a few days time to inspect the invoices and make the necessary board order for payment, that they should be permitted on that account to evade payment. But the answer to that argument is, that the Legislature has drawn no line or made any distinction, and one can see that if a door was left open for the creation of debts, the intentions of the Legislature would in a great measure be frustrated; and so, in order fully to protect the members of the association, and to put it out of the power of any of its officers or any number of members, upon any pretence whatever, involving the association in any liability, it declares in effect that the association shall not be liable for or on account of any debt or contract. The words used in the clause, "The business of the association shall be a cash business exclusively; no credit shall be given or taken; * * everything shall be bought and sold for cash only," shew very clearly that, on the one hand, they are protected against any action, and they themselves appear by the statute also to be deprived of all remedy if they sell on credit or part with the goods without payment in cash.

Another question arose at the trial, as to whether the illegality of the transaction should not have been specially pleaded. We are inclined to think that it should have been. The learned Judge at the trial would have allowed the plea to be added, and so expressed himself, and as it was understood at the trial that this Court should have power to make such order as might be necessary for determining the question between the parties, and so the rule *nisi* was so moved, our judgment will therefore proceed as if the plea had been added, with leave to add the plea.

Rule discharged.

THE CORPORATION OF THE TOWNSHIP OF RAWDON V. WARD,
PARKER, AND STEDMAN.*Bond to pay over money—Award—Construction.*

Plaintiffs declared on a bond, conditioned that W., their treasurer, should pay over all moneys received since the 1st January, 1866, averring that on that day he had in his hands a large sum, and received further sums up to the 6th April, 1868, when he was dismissed; and that he accounted for all moneys received before the 1st January, 1866, but not for a large sum received since. *Plea*, alleging payment of all moneys since that day; and issue thereon. The case being referred, the arbitrator found that W. admitted \$3,031 to be due by him on the 1st January, 1866; that he had accounted for all moneys received since; and that of all moneys received up to his dismissal, including this \$3,031, the balance was \$1,806.

Held, that as the breach was only in respect of moneys received since the 1st January, 1866, the plaintiff upon this finding could recover nothing.

SPECIAL case, stated by an arbitrator for the opinion of the Court.

The declaration was on a bond against the principal, Ward, and his two sureties, Parker and Stedman. It set out that the three defendants by their bond, dated 6th November, 1866, became bound to the plaintiff in \$20,000, conditioned that if Ward should duly and faithfully perform all his duties as treasurer of the plaintiffs, and should duly receive and faithfully keep all moneys belonging to the plaintiffs, and account for all moneys that he had received since the 1st day of January last (1866), and all moneys that he might or would receive as such treasurer, and pay out the same to such person or persons, &c., as directed, and should at all times, &c., properly conduct himself, &c., then the bond to be void, &c. *Averment*, that Ward was appointed treasurer before the 1st of January, 1866, &c., and entered on the duties thereof from thence to the 6th April, 1868, &c.: that on the 1st of January, 1866, he had received and had in his hands large sums of money of the plaintiffs, and that since then, in the year 1866, and in each and every year to the 6th April, 1868, when he was dismissed, as such treasurer he did receive and take for the plaintiffs large sums of

money. Averment, that Ward accounted for and paid over as directed the moneys so received by him before the 1st of January, 1866. Breach, that in respect of part of the moneys so received by Ward after the 1st of January, 1866, to wit, \$5,000, Ward did not duly and faithfully perform all his duties, &c., nor account for all moneys which he received since the 1st of January, 1866, nor pay out the same, &c., nor did he properly conduct himself, nor did he deliver the remainder of such moneys to his successor, &c.

Plea, by defendant Ward, traversing the breaches, and alleging performance, &c., and payment of all moneys received since the 1st of January, 1866; and issue thereon.

The case was entered for trial at the Assizes for the County of Hastings, in September, 1868, and it was agreed that a verdict should be entered for the plaintiffs for \$2,000, subject to be increased, reduced, or a verdict for defendants on non-suit to be entered, according to the award of the clerk of the County Court, Mr. Northrup; the arbitrator at the request of either party to submit all points of law raised, and the facts connected therewith, to this Court, and award in the different alternatives as the Court might decide.

The arbitrator found that some time after the execution of the bond, at an audit of the treasurer's books, Ward admitted that the statement in his books shewing \$3013.09 at his debit on the 1st of January, 1866, as a balance not paid over to plaintiffs previous to the 1st of January, 1866, was correct, and that he was liable for it. He also found that of all moneys received by Ward to his dismissal, including this \$3031.09, the balance unaccounted for was \$1806.06. He also found that Ward had paid over and accounted for all moneys received by him since the 1st January, 1866. He also stated that the defendants' counsel objected that the statement in the treasurer's books and Ward's admission at the time of the audit were only admissible as evidence against Ward himself, and not against the two sureties, the other defen-

dants; and at the request of the defendants' counsel he submitted the following questions for the opinion of the Court:

1. Whether on the facts set forth, and on the record, the defendants Parker and Stedman are or are not jointly with Ward liable for the sum of \$1806.06, the balance of moneys in the hands of the treasurer Ward at the time of his dismissal, and not paid over to the plaintiffs.

2. Whether on the above facts and issues the verdict can be entered against Ward for the sum of \$1806.06, and in favor of the other defendants, his sureties.

And upon the whole matter he found, that if the Court should decide the first question in the affirmative, the verdict entered for the plaintiffs should stand, and the damages be reduced to \$1806.06, and that the costs of the reference and award be paid to the plaintiffs by the defendants; but if the Court should decide in the negative to the first question, and in the affirmative to the second question, the verdict ought to be for the defendants Parker and Stedman, and against the defendant Ward, with the costs of the reference and award.

Ferguson for the plaintiffs, cited *Canada West, &c., Ins. Co. v. Merritt*, 20 U. C. R. 444; *Mutual Fire Ins. Co. of Prescott v. Palmer*, *Ib.* 441; *Municipal Council of South Easthope v. Helmer*, 7 C. P. 506.

Jellett, contra, cited *Latta v. Wallbridge*, 3 P. R. 157.

MORRISON, J., delivered the judgment of the Court.

The declaration avers that the defendant Ward accounted for and paid over as directed by the plaintiffs all moneys received by him before the 1st of January, 1866, and the only breach assigned is, that in respect of part of the moneys received by Ward after the 1st January, 1866, he (Ward) did not duly account for all such moneys received by him since that day, nor did he pay over the same, &c. To this the defendants plead performance by Ward, and traversing the breach assigned. The arbitrator finds that Ward did account for

and pay over to the plaintiffs, &c., all moneys that he received since the 1st January, 1866, to the time of his dismissal; in other words, he finds the defendants' plea proved, and in such case the defendants were entitled to a verdict being rendered in their favor.

It is unnecessary to give any opinion as to the admissibility of the admissions of defendant Ward as evidence against his co-defendants, as this action is not brought, nor is the breach assigned, for not accounting for moneys received prior to the 1st of January, 1866, but only on account of moneys received by Ward since that date.

We are of opinion that, as to the first point, the defendants Parker and Stedman are not conjointly with Ward liable for the sum of \$1806.06; and as to the second question, we are also of opinion that the verdict cannot be entered against Ward alone.

The rule must be absolute, referring back the matter to the arbitrator, with an intimation that a nonsuit should be ordered, or a verdict be entered for defendants, at the election of the plaintiffs, and that the time be enlarged for making the award to the first day of next term.

Rule Absolute.

THE QUEEN V. CURTLEY.

Murder—Indictment as accessory—Evidence.

The prisoner, C., was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that about six in the evening the deceased was with R. and his wife on the river bank at Amherstburgh, standing near a pile of wood. She saw M. standing behind the pile, who on deceased going up to him struck deceased with a stick, of which he died; deceased ran, when two other men sprang out and followed him, but in a few seconds two of them returned and assaulted her and her husband. She could not identify the prisoner. Two other witnesses saw the blow struck, and identified M.; and one witness, B., swore that about six on that evening deceased left his office with R. and his wife, and that about twenty minutes after he saw the prisoner, with M. and another, go into the vacant lot where the wood-pile was, M. having a stick in his hand, and heard M. say to the others "Let us go for him." It was also proved by others that the three were together before the affray, and in a saloon together about nine o'clock afterwards. *Held*, that there was no sufficient evidence to warrant the prisoner's conviction, for there was no direct proof that he was present when the blow was struck, and no evidence whatever that he and the others were together with any common unlawful purpose; and the words spoken were in themselves unimportant.

THE prisoner was indicted, together with Charles Medley, and one George Brown who was not in custody, in the first count, for the murder of Oliver Minor; and in the second count he was charged with Brown as aiding and abetting Medley in the murder.

The case was tried before *Becher* Q.C., at the last Sandwich assizes.

The prisoners severed in their challenges. Medley was convicted of the murder, and the prisoner was convicted on the second count, and sentenced to be executed.

It appeared from the evidence that the deceased, on the evening of the 13th October last, about six o'clock, in company with one Rose and his wife, were standing near a pile of wood on the bank of the river, in the town of Amherstburgh: that Rose's wife, who was waiting for her husband, saw a man near where she was standing, and behind the wood-pile: that she told her husband, saying to him that he had better come away: that deceased hearing this stepped over to the man, and asked him what he was looking at, or whether he was looking at him: that, according to

Mrs. Rose's account, the man made no remark, but struck deceased with a stick, and two other men sprang out from the same place: that the deceased ran off: that she, Mrs. Rose, told her husband to come along, and while in the act of going two of the men assaulted her, one catching her by the arm, saying he was an officer and going to arrest her: that the smaller man of the two came behind her husband, and struck him on the ear, knocking him down: that one struck her in the eye: that Medley was the man: and that it was he who struck deceased with the stick: that she cried murder, when the two ran away in the direction they came from, and she and her husband went home. She could not say that the prisoner was either of the two men who assaulted her, or the third man who was there.

On her cross-examination she was examined at length as to the identity of the prisoner, and she also said that when the deceased ran away they followed after him, and in two or three seconds two of them came back—namely, Medley and the smaller man—and went after her and her husband, and she stated that the prisoner was not either of those two men. She also stated that when the deceased was struck and ran off, he pushed through the men, and one man, who stood a step on one side of Medley, did nothing. Her husband's, Rose's, testimony was nearly to the same effect. He did not identify or speak as to any of the parties, and he was at the time under the influence of liquor, according to his testimony.

Two witnesses stated that they heard a woman scream murder, and about a minute after they saw deceased running from the direction of the wood-pile, and across the road, when he fell over a stick of timber: that they saw a man at the same time come running from the wood-pile, and as deceased got up he struck him with a stick, knocking him down, and again struck him on the head, and then the man run off to the north. One of those witnesses said that man was Charles Medley; the other did not know the man.

A witness, Bradley, testified that on the evening in question deceased and Rose and his wife were at witness's

office: that they left together about six P. M.: that the witness went to his tea about a quarter of an hour after: that on the same road that deceased and Rose had gone he saw Medley, prisoner and Brown, Medley having a stick in his hand: that the three went to the bottom of the hill and stopped: that the witness watched them; they went into the vacant lot where the wood-pile was. He also stated that he heard Medley say to the others, "Let us go for him," and witness then walked home.

One Taylor testified that near the wood-pile in question he saw three men standing, the one next to him was dressed in light clothing, he was the shortest; the one next to him was shorter than the third, who was a pretty tall man; and he said, "I think prisoner was one of the three men I saw; he was the one who was nearest to me." He also said he should take prisoner and Medley to be two of the three men.

Other witnesses testified to seeing the prisoner with Medley before the affray, and one witness to seeing the three in a saloon about nine that night.

It was proved that the cause of death was the blows received on the head.

At the close of the case the prisoner's counsel submitted that no case was made against the prisoner to go to the jury. The learned Queen's Counsel thought the case could not be withdrawn from the jury, although he was of opinion, as he afterwards told the jury, that but for the evidence of Bradley he should have directed an acquittal.

He told the jury that if they found that the prisoner was one of the two men referred to, the one spoken of by Eliza Rose as the smaller man, and if they believed her account of what that man did, it was competent for them to find the prisoner guilty, and that they were carefully to consider whether the prisoner was that smaller man before convicting. He also told them that Bradley's evidence, if they believed it, was positive that the prisoner was with Medley and Brown in the vacant lot, within eighteen or twenty feet from the place where deceased was

first attacked, a little after half-past six, and close to the time of the attack, and he heard Medley say to the prisoner and Brown the words "Let us go for him;" and he cautioned them as to the effect of these words; but he told them that it was quite open to them, considering all the evidence and what was done afterwards, to infer that all three had been talking about the deceased, and that this expression referred to him, and to something they were to do to him connected with what followed: that a construction very unfavorable to the prisoner might be put upon it, if they so viewed it, but that it was capable of a thousand innocent constructions, which they must decide: that he could not withdraw the case from them, as it was open for them to believe Mrs. Rose's evidence in part and to think her mistaken in part, to believe she was wrong in saying that the prisoner was not the "smaller man," while believing her fully as to what she said the smaller man said; and that it was open to them, on the subsequent evidence of Taylor and Bradley, to conclude the prisoner was the smaller man she described.

The jury found the prisoner guilty on the second count, as already stated.

Prince, Q. C., obtained a rule *nisi* for a new trial, on behalf of the prisoner, on the ground that there was no evidence to go to the jury sufficient to justify his conviction, and also on the ground of misdirection, in the learned Queen's Counsel charging the jury that there was such evidence, and that they might disbelieve the evidence of the witness Eliza Rose and yet find the prisoner guilty.

K. McKenzie, Q. C., for the Crown, shewed cause, citing *Regina v. Greenwood*, 23 U.C.R. 255; *Regina v. McMahon*, 26 U.C.R. 195; *Regina v. Hamilton*, 16 C.P. 340; *Regina v. Downing et al.*, 1 Cox C. C. 156; *Regina v. Price et al.*, 8 Cox C. C. 96.

Prince, Q. C., supported the rule, and cited *Regina v. Hodge*, Lewin C. C. 227.

MORRISON, J., delivered the judgment of the Court.

As to the first ground taken in the rule, that there was not evidence to go to the jury sufficient to justify the conviction.

The rule of law is laid down in Sir Wm. Russell's *Treatise on Crimes*, page 49, vol. i. 4th ed. "In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary; but the *presence* need not be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes, but may be a constructive presence, * * But there must be some participation." At page 55 he says: "If a fact amounting to murder should be committed *in prosecution of some unlawful purpose*, though it were but a bare trespass, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be guilty of murder. But this will only apply to a case where the murder was committed *in prosecution of some unlawful purpose*, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow may himself be guilty of murder, or manslaughter, yet the others who came together for a different purpose will not be involved in his guilt."

It has also been held that when the act of homicide is not done with the concurrence of the others, there must be evidence of a precedent common purpose to prosecute the unlawful enterprise even to the extent of extreme and deadly violence, in order to render the others liable: *Rex v. Collison* (4 C. & P. 565); *Regina v. Howell* (9 C. & P. 450). Even in the case of felony there must either be a previous or present concurrence in the act or intention to use deadly violence to the person: *Regina v. Franz* (2 F. & F. 580), but otherwise no others than the party actually committing the act will be liable, except those who had precedent design to prosecute the unlawful purpose with

deadly violence: *Regina v. Skeet et al.* (4 F. & F. 931, and notes), *Regina v. Price* (8 Cox C. C. 96.)

From the evidence given at the trial it does not appear, assuming that there was evidence of the prisoner's presence, that the prisoners Medley and Brown were together for any object or purpose, or with any understanding, or that the first assault was made in prosecution of any unlawful purpose. There is no evidence that the prisoner was present, aiding, &c., when the blows which caused the death of the deceased were given, or that he was present when the affray began, for the witnesses who testify to seeing the fatal blows struck by Medley swear that he (Medley) alone was present; and the only witness who could give testimony as to the origin of the affray could not identify the prisoner as one of the three, and she also swears that he was not one of the two who followed the deceased and was active in the assault upon herself and husband as well as the deceased.

The only testimony applicable to the prisoner is, that he was seen with the other two shortly before the time of the assault, as stated by Bradley, and one witness who said he thought that the prisoner was one of three he saw at the wood pile, and that he was seen in a saloon where the others were about three hours after the deceased was struck.

The expression used by Medley, "Let us go for him," heard by the witness Bradley, and which was pressed on us as indicating the intent of the parties, *per se* is unimportant, for in the absence of evidence shewing that Medley was alluding to the deceased, or that the prisoner and Medley were aware that the deceased was at the wood pile, it is obviously susceptible of different applications; and it is quite consistent that the words were used with reference to some other person, and with a view to some innocent purpose, and that while in prosecution of that purpose Medley and the others may have come upon the deceased and Rose and his wife by mere accident, and that Medley being accosted as he was by the deceased was the originating cause of

the affray ; and assuming that the prisoner was one of the three, Medley may have acted upon some private grudge against the deceased, and so committed the assault and murder without the concurrence and against the will of the prisoner.

The testimony of the witness Eliza Rose proves nothing against the prisoner, while she negatives the presence of the prisoner when the first assault was made, and the witnesses who saw the fatal blows given after the deceased fled prove that the prisoner was not present ; and the only testimony bearing on the prisoner is, that he was with the person or persons who committed the murderous assault just before the commencement of the affray. No words or acts of the prisoner were proved in reference to the deceased or any of those with him, or that he, Medley and Brown, were together with any common purpose or design, or that the prisoner had any knowledge of the deceased and the others being at the wood-pile in question ; so that on the whole case we are of opinion that the evidence was not sufficient to justify a conviction, and that the jury should have been so directed.

Strictly speaking, it may be said that there was some evidence from which the jury might infer that the prisoner was one of the three, being seen just before the assault going with the others to the place where the deceased was ; but that fact alone, although it would naturally create grave suspicion against the prisoner, would not, in the absence of proof of his actual presence when the crime was committed, and in the absence of any evidence of a pre-arranged design, be sufficient to convict. But even assuming that the jury might infer the prisoner's presence, yet by the bare fact that one sees a felony is about to be committed, and does in no manner interfere, he does not thereby participate in the felony committed, to make him an aider, &c. ; it should be shewn that he did or said something shewing his consent to the felonious purpose, and contributing to its execution.

Then as to the question of mis-direction, it is not necessary to consider it, as we are of opinion that the evidence

given was not such as to justify the conviction of the prisoner.

The rule will be absolute for a new trial.

Rule absolute for new trial.



A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

THE COURT OF QUEEN'S BENCH,

FROM EASTER TERM, 30 VICTORIA, TO MICHAELMAS TERM, 32 VICTORIA.

ACCIDENT.

By Railway—See NEGLIGENCE. 1.
Caused by defect of Fences—See
RAILWAYS & RAILWAY COS. 1.

Liability of tavern-keepers for, under 27-28 Vic. ch. 18, sec. 40—meaning of the word Accident.—See
TEMPERANCE ACT.

By Municipal Corporation against one of its members.—See MUNICIPAL CORPORATIONS, 5.

ACCORD AND SATISFACTION.

Payment by cheque—Laches in presentment, &c.—Pleading—Evidence.—The plaintiff on the 12th January, 1867, gave the defendants \$120 in silver, and \$4.50 for the discount on it, receiving their I. O. U. for \$150 in bills. Afterwards, on the same day, they gave him the cheque of one H. on a Bank, payable to the defendants or bearer, but post-dated to the 16th. It was not presented till the 18th, and was refused, there having been no funds since the 16th. H. on the same day told the plaintiff he would make it all right,

and the plaintiff in consequence left it at the bank, but on that evening H. made an assignment, having been insolvent for some time. The defendants' shop was closed on the 19th, Saturday, and on Monday the plaintiff returned the cheque to them as worthless, still retaining their I. O. U. The plaintiff having sued on a special count for not delivering the bills, and on the common counts and account stated, it was left to the jury to say whether there was a debt due by the defendants to the plaintiff when the cheque was given, and whether it was accepted in satisfaction; and they found for the plaintiff.

Held, affirming the judgment of the County Court, 1. That the case was properly submitted, and the verdict right.

2. That under a plea of payment the defendants could not set up that the plaintiff by his laches in presentment and notice had made the cheque his own; and *semble*, had this been specially pleaded, the plaintiff on a replication of the facts

excusing his delay would have been entitled to succeed.—*Smith v. Buchanan et al.*, 106.

ACTION.

Right of, by purchaser from Crown Lands before issue of patent.—See CROWN LANDS, 1, 2.

When barred by agreement to refer.—See CONTRACT, 2.

See WATER, 1.

ADMINISTRATOR.

Good-will of business—Statute of Frauds.—*Held*, Affirming *Christie v. Clarke*, 16 C. P. 544, and the judgment of the County Court in this case—1. That the grant of letters of administration had relation back to the death of intestate, so as to enable the administratrix to sue upon a contract made by her before such grant, for the sale of the good-will of intestate's business as a surgeon and physician.

2. That although the administratrix was not bound to sell such good-will, yet, having done so, the proceeds were assets, for which she must account.

3. That as the vendor's part of the bargain was to be performed within a year, the Statute of Frauds did not apply.—*Christie, Administratrix v. Clark*, 21.

ADMISSIONS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.—EVIDENCE, 1.

AGREEMENT.

Under 29 & 30 Vic. ch. 92.—See RAILWAYS AND RAILWAY COS. 1.

See CONTRACT.

ALTERATION.

Deed—Alteration—Escrow—Ratification.—To an action against V. and G. on their covenant as sureties for the payment of rent by lessees, V. pleaded that the agreement was drawn up to be signed by one C. as his co-surety, and delivered by him as an escrow until C. should execute, which C. afterwards refused to do; and that the plaintiff then, without V.'s consent, erased C.'s name and inserted that of the other defendant. The plaintiff replied, that after both defendants had executed, V. ratified the agreement and accepted the other defendant as his co-surety.

There was contradictory evidence as to the ratification, but the subscribing witness swore that V. executed without any condition, C.'s name having been previously erased. The other defendant said he signed at V.'s request; and it was proved that V. had told others he was responsible for the rent.

Held, that this was evidence from which a ratification might be inferred; and as the defendant had laid by for years, leaving the plaintiff to believe, and telling others, that he was bound, a verdict for the plaintiff was upheld.—*Henderson v. Vermilyea and S. Gonsoles*, 544.

AMENDMENT.

When rule is wrongly entitled.—See CONVICTION, 1.

Allowed for omission of placita or continuances on the record.—See DESJARDINS CANAL CO., 2.

On appeal from County Court.—See PLEADING.

APPEAL.

Costs of appeal from a conviction must be determined at the Sessions appealed to; cannot be adjourned.]
—See CONVICTION, 2.

Inconvenience of, under certain circumstances.]—See COMMON COUNTS.

See COUNTY COURTS.

 ARBITRATION AND AWARD.

1. *Action on award—Plea of fraud—Admissibility of evidence not before arbitrators.]*—Arbitrators having awarded compensation to the plaintiff for injuriously affecting his land, to an action on the award defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was made by the fraud of the plaintiff and the arbitrators.

The land in question was situate upon a navigable river, running down to high water mark, and defendants' railway was built upon cribs in the river, cutting him off from access to the water, which was the injury complained of.

The jury were directed, that if the plaintiff contended before the arbitrators that by law and under his deed he had such an exclusive right to the water in front of his land as would entitle him to damages, when he had not, this was evidence of fraud under the plea. *Held*, affirming the judgment of the Court of Queen's Bench, that this was a misdirection,

That Court decided that no evidence of the value of the land and the injury done to it which was not offered at the arbitration could be admitted in support of the plea. *Per Richards, C. J., Adam Wilson, J., Morrison, J., and John Wilson, J.*, such evidence could not be wholly

rejected. *Per Draper, C. J., Mowat, V. C., and Spragge, V. C.*, it was not admissible.—*Widder v. The Buffalo and Lake Huron R. W. Co.*, 425. [In Appeal].

2. *Bond to pay out money—Award—Construction.]*—Plaintiffs declared on a bond, conditioned that W., their treasurer, should pay over all moneys received since the 1st of January, 1866, averring that on that day he had in his hands a large sum, and received further sums up to the 6th of April, 1868, when he was dismissed; and that he accounted for all moneys received before that day, but not for a large sum received since. *Plea*, alleging payment of all moneys since that day; and issue thereon. The case being referred, the arbitrator found that W. admitted \$3.031 to be due by him on the 1st of January, 1866; that he had accounted for all moneys received since; and that of all moneys received up to his dismissal, including the \$3.031, the balance was \$1,806.

Held, that as the breach was only in respect of moneys received since the 1st of January, 1866, the plaintiff upon this finding could recover nothing.—*The Corporation of the Township of Rawdon v. Ward et al.*, 609.

Agreement to refer disputes—When a bar to action.]—See CONTRACT, 2.

 ARREST.

A Clerk of the County Court, being also *ex officio* Deputy Clerk of the Crown and Clerk of Assize, is privileged from arrest only while engaged in his official duties, or while going to or returning from his office; and this Court therefore discharged a rule to prohibit the

County Court Judge from issuing an order of commitment against such officer.—*In re Mackay et al. v. Goodson*, 263.

After discharge under Insolvent Act the party may be committed under Division Courts Act.]—See **INSOLVENT**, 4.

See **DIVISION COURTS**, 1—**SHERIFF**, 2, 4.

ASSESSMENT.

See **TAXES**.

ASSURANCE.

See **INSURANCE**.

ATTACHMENT.

Maliciously issuing.]—See **MALICIOUS PROSECUTION**.

Against County Court Judge, for non-attendance on subpœna.]—See **SUBPœNA**.

ATTORNEY.

Taxation of costs—Right to dispute retainer.]—See **COSTS**, 1.

See **SUBPœNA**.

AWARD.

See **ARBITRATION AND AWARD**.

BANK.

Failure of—Delay in presenting draft.]—See **MONEY HAD AND RECEIVED**.

BANKRUPTCY.

See **INSOLVENT**.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Note payable to bearer—Proof of plaintiff being the holder—Evidence—Answer in Chancery.*]—Defendant made a note payable to T. or bearer, who died before it matured. His widow married one P., and they sold the note to G., who transferred it to the plaintiff. One D. administered to T.'s estate, and took proceedings against P. and his wife to recover the assets. A bill was filed by defendants to restrain this action, and in his answer the plaintiff swore that, in consequence of the difficulties with the administrator, he had returned the note to G. before this action; that he had had no interest in it since, and never authorized or heard of this action. The plaintiff's attorney swore, on the other side, that both the plaintiff and G. instructed the suit, and the plaintiff had recognized it, saying that he was indemnified by G. The jury having found for the plaintiff on a plea denying that he was the lawful holder, a new trial was refused in the County Court.

Held, 1. Affirming the judgment below, that the plaintiff's answer in Chancery though very strong evidence, was not conclusive.

2. Reversing such judgment, that admissions by G. were improperly rejected, he being, according to the plaintiff's statement, the person on whose immediate behalf the action was brought.

3. That upon the evidence the plaintiff should have been found to be the holder. *Ancona v. Marks*, 7 H. & N. 686, distinguished.—*Coates v. Kelty et al.*, 284.

2. *Promissory note payable in U. S.—In what currency payable*]—A

note made here payable at a place in the United States, but not "not otherwise or elsewhere," is payable generally, and the law and currency of the place of contract must govern.

Declaration on a note, made at Toronto, payable to plaintiffs, for \$302.79. *Plea*, that the note was payable in Rochester, in the United States, where the plaintiff resided: that when it fell due Treasury notes of the U. S. Government were a legal tender in payment of all notes: that if the defendant had then tendered the amount of the note in Treasury notes it would have been a good tender: that \$144.53 of lawful money of Canada then equalled in value Treasury notes to the amount of the note; and defendant brings that sum into Court.

Held, assuming the note to have been payable at Rochester, but without the words not otherwise or elsewhere, that the plea was bad.—*Hooker et al. v. Leslie*, 295.

Mortgage as collateral security.]
—See MORTGAGE, 1.

Competency of payee as witness.]
—See WITNESS, 2,

See MONEY HAD AND RECEIVED, 1.
NEW TRIAL, 2.

BOND.

To Sheriff on arrest under Ca. Sa. form of.—See SHERIFF, 4.

See ARBITRATION AND AWARD, 2.

BOUNDARY.

Inconsistent Surveys.—See LICENSE TO CUT TIMBER—See SURVEY.

BRIDGE.

See DESJARDINS CANAL CO., 1, 2.

BUFFALO AND LAKE HURON RAILWAY CO.

Effect of their agreement with the Grand Trunk Railway Co.—See RAILWAYS AND RAILWAY CO'S.

BUTCHERS.

MUNICIPAL CORPORATIONS, 6.

BY-LAW.

See MUNICIPAL CORPORATIONS, 2, 3, 4, 6.

CERTIORARI.

See CONVICTION.

CHAMBERS.

See JUDGE IN, CHAMBERS.

CHATTEL MORTGAGE.

See INSOLVENT, 3.

CHEQUE.

Payment by, and laches in present ment.—See ACCORD AND SATISFACTION.

COLLISION.

See SHIPS, 2.

COMMITMENT.

Privilege of County Court Clerk from arrest.—See ARREST.

A discharge under the Insolvent Act does not prevent commitment under Division Courts Act.—See INSOLVENT, 4.

See DIVISION COURTS, 1.

COMMON COUNTS.

Express Contract—Fraud—Right to sue on—Appeal—Practice.—To

an action on the common counts for goods sold, defendant pleaded that at the time of the sale the plaintiff agreed to and did receive in payment therefor two promissory notes made by one M. The plaintiff replied that he was induced to receive these notes by fraud (setting out defendant's fraudulent representations respecting them). The facts as stated in the pleadings being admitted by the plaintiff's counsel:

Held, affirming the judgment of the County Court, that the plaintiff could not recover; for, there being an express contract, defendant's fraud could not create an implied one, though it would entitle the plaintiff to recover back the goods, or maintain a special action for the deceit.

There was also a demurrer to the replication, and a verdict had been directed for defendant on the plaintiff's opening, from which the plaintiff appealed. Remarks as to the inconvenience of an appeal under such circumstances.—*Sheriff v. McCoy*, 597.

See MUNICIPAL CORPORATIONS, 5.

COMMON SCHOOLS.

Assessment for support of.—See TAXES, 1.

CONDITIONS.

General averment of performance of—Effect of.—See LANDLORD AND TENANT, 2.

CONFLICT OF LAWS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

CONTRACT.

1. *Agreement — Construction —*

Work and labor.—Defendants and another Company had insured a vessel, which was sunk while being towed by the plaintiffs for her owners. An agreement was then entered into between the plaintiffs and the Insurance Companies, by which, after reciting that the liability for raising the vessel was undetermined, the plaintiffs undertook to raise her for a sum named, and it was agreed to submit to arbitration by whom such sum, and the other expenses of repairing the vessel, should be borne. After this the owners sued the plaintiffs for negligence in sinking the vessel, and recovered. The defendants refused to arbitrate, and the plaintiffs then sued them for work and labor.

Held, that they could not recover, for defendants had agreed only to pay in the event of the arbitrators deciding that they were liable, and it was not certain whether the plaintiffs were entitled to be paid at all.

The question as to the plaintiffs' negligence was left to the jury, and found in their favor; but, *Held*, that such question could not be tried in this action; and *Semble*, that on the evidence the verdict was wrong.—*Calvin et al. v. The Provincial Insurance Company*, 403.

2. *Agreement to hire—Termination by notice—Agreement to refer disputes—Construction.*—The defendant hired the plaintiff to make for him certain machines and superintend their use in his manufactory for a term of five years, unless before terminated as thereafter provided; and in case of failure of the plaintiff to perform fully the agreement, it might be terminated, at defendant's option, by giving

written notice to that effect, and the plaintiff should be responsible to defendant in damages for such failure; and in case any dispute should arise as to the sufficiency of the machines or plaintiff's performance of the agreement, the same should be referred to three arbitrators chosen in the manner stated, their decision to be final.

To an action by the plaintiff for wrongful dismissal, the defendant pleaded termination by him of the agreement by written notice, because of the plaintiff's failure to perform it in certain particulars specified.

Held, 1. That defendant was bound to establish the ground mentioned in his notice for terminating his agreement.

2. That the agreement to refer being collateral, and not a condition precedent to the plaintiff's right to sue, could not bar the action.—*Griggs v. Billington*, 520.

Fraud of party to, cannot make an express contract an implied one.—*See* COMMON COUNTS.

Agreement for use of water.—*See* WATER, 3.

Under 29-30 Vic. ch. 92.—*See* RAILWAYS AND RAILWAY COS., 1.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—EVIDENCE, 3—GUARANTEE—WORK AND LABOR.

CONVERSION.

See TROVER.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCE.

See DEED—FRAUDULENT DEED—MARRIED WOMEN.

CONVICTION.

1. *Application to quash—Entitling rule nisi—Practice.*—On application to quash a conviction, so soon as the return to the *certiorari* has been filed the cause is in this Court, and the motion paper and rule *nisi* must be entitled in the cause.

Where the rule was not so entitled it was discharged, but, being on a technical objection, without costs; and under the circumstances of the case an amendment was not allowed.—*Regina v. Mortson*, 132.

2. *Appeal to Q. S.—Adjournment—Certiorari—Notice.*—Under Consol. Stat. U. C. ch. 114. the costs of appeal from a conviction, as well as the appeal itself, must be determined at the Sessions appealed to. There is no power to adjourn the question of costs.

Where the application for a *certiorari* to remove a conviction is made by the prosecutor, no notice to the justices is necessary.—*Regina v. Murray*, 134.

3. *Practice.*—On applications to quash convictions the convicting Justice must be made a party to the rule.—*Regina v. Law and Gill*, 260.

See LICENSE TO SELL LIQUORS.

CO-OPERATIVE ASSOCIATIONS.

29 Vic. ch. 22, sec. 14—*Sale to not for cash—Pleading.*—The plaintiffs supplied goods to a co-operative association, formed under 29 Vic. ch. 22, on the order of their manager. The terms of purchase

were said to be cash, but it appeared that according to the course of dealing between the parties, before payment the invoices were laid before a board meeting, and if found correct the treasurer was ordered to pay. These goods were ordered in January, and not paid for, and in July the plaintiffs sued.

Held, not a cash transaction, within the 14th section of the act, and that the plaintiffs could not recover.

Semble, that the defence should have been specially pleaded, and the plea was allowed to be added.—*Fitzgerald et al. v. The London Co-operative Association, (Limited)*, 605.

CORPORATIONS.

Particulars — Construction of — Ultra vires—Fraud—Estoppel by.]
—The defendant being employed by the plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished, but not for work and labor—

Held, 1. That they could recover under the particulars, for proof of the work expended on the goods was a mode of ascertaining their value, and the defendant could not have been misled.

2. That defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs, under their charter, could not sue on such a cause of action.

3. The articles thus furnished were charged by the plaintiffs at

\$500, which the jury gave, and allowed a doubtful credit of \$180, though such goods could have been obtained at an establishment for the purpose for about \$180; but much time had been expended in experiments and in making tools for the work, not required in the plaintiffs' business. *Held*, that the damages were not excessive.—*The Northern R. W. Co. v. Lister*, 57.

COSTS.

1. *Taxation*].—In referring an attorney's bill to taxation, there is no authority here, without his consent, to reserve the right to dispute the retainer. It exists in England under 6 & 7 Vic. ch. 73, which differs in this respect from our Consol. Stat. U. C. ch. 35, sec. 44. —*In re Totten, an Attorney*, 449.

2. *Trespass—Revision.*].—In trespass for entering plaintiff's close and taking his goods, defendant pleaded not guilty, that the goods were not the plaintiff's, and justification under a *fi. fa.* Title to land was not brought in question. *Held*, that the plaintiff on a verdict for \$175 was clearly not entitled to full costs without a certificate.

Where the taxation is not objected to before the Master, the Court is slow to interfere, but *Held*, that the circumstances shewn in this case sufficiently explained the omission.—*Stewart v. Jarvis et al*, 467.

Of appeal from a conviction, as well as the appeal itself, under Con. Stat. U.C.ch. 114, must be determined at the sessions appealed to.].—See CONVICTION, 2.

Demandant's right in action for dower to sign judgment by default for.].—See DOWER, 3.

Right of Jury to give costs.]—
See VERDICT.

See EVIDENCE, 6.

COUNTY COURTS.

1. The unnecessary length of the appeal books remarked upon in this case.—*Phillips v. Findlay*, 32.

2. The manner in which the appeal books were written remarked upon.—*Cloy et al. v. Jacques et al.*, 88.

3. *Appeal—Judgment signed—Practice—Irregularity or nullity.]—*Defendant in the County Court obtained a rule *nisi* to enter a nonsuit, with stay of proceedings; it was not signed by the Clerk, but had at the side the words "Rule *nisi* granted: W. Salmon, Judge." Plaintiff's attorney, treating it as no rule, signed judgment, but the Judge held it to be a proper rule and the judgment a nullity, and ordered a nonsuit. On appeal by the plaintiff—

Held, that the judgment was irregular only, and should therefore have been got rid of before any other step could be taken; and on this ground the appeal was allowed.—*Brown v. Cline*, 87.

*Amendment of pleadings on appeal from.]—*See PLEADING.

COUNTY COURT CLERK.

*Privilege of from arrest.]—*See ARREST.

COVENANT.

*Deed—Construction—Implied covenant—Excessive damages.]—*An indenture between the plaintiff and defendant recited that defendant was the owner and occupier of certain timber limits, and had agreed

to sell to the plaintiff all the square timber growing there of a specified length, for \$1,000, the receipt of which was acknowledged, and witnessed that the plaintiff "had a right to cut, make and draw off the said timber until the 15th April next, and not longer."

Held, *Hagarty*, J., doubting, that taken altogether the instrument contained a covenant by defendant that he owned the limits, and had power to sell and give the plaintiff a right to remove the timber.

The first count was on this covenant, the second for a fraudulent representation of ownership, &c., which was not proved. The jury found a general verdict for \$1,000, which upon the evidence was excessive; and on these grounds a new trial was granted.—*Link v. Hunter*, 187.

COVENANTS FOR TITLE.

*Defects known to vendee—Equitable pleading.]—*Action on covenants for seisin and right to convey, contained in a deed by the defendants to one F., who had conveyed to the plaintiffs. Plea, on equitable grounds, that the conveyance to F. was voluntary, and he knew when the defendants executed it that they were not seized, and had not the right to convey; and the plaintiffs were aware of these facts when F. conveyed to them. *Held*, on demurrer, no defence, for such covenants are not in equity confined to defects unknown to the vendee.

The plaintiff replied equitably, that F.'s deed to the plaintiff was a mortgage, to secure money then lent to him by them, and defendants conveyed to F. for the express purpose of enabling him to execute such mortgage and obtain the loan,

and the plaintiffs were induced to lend by their reliance on defendants' covenants, as the defendants well knew.

Semble, that if the plea had been good, the replication would have been an answer to it.—*Trust and Loan Company of Upper Canada v. Covert et al.*, 120.

CRIMINAL LAW.

1. *Assisting sailors to desert*—*C. S. U. C. ch. 100*—*Form of indictment &c.*—Defendant in a criminal case obtained a rule *nisi* for a new trial, but his term of imprisonment expired before judgment could be given after the argument, and the decision therefore became immaterial.

The indictment charged that the defendant "did receive, conceal or assist" one W., a deserter from the Navy. *Semble*, not sufficiently certain and precise.

The Naval Discipline Act, 29 & 30 Vic. ch. 109, sec. 25, authorizes a summary conviction before magistrates for this offence, but the 101st section expressly preserves the power of any Court of ordinary civil or criminal jurisdiction with respect to any offence mentioned in the Act punishable by Common or Statute Law; and *Held*, therefore, that defendant could be indicted under the Consol. Stat. U. C. ch. 100, sec. 2.—*Regina v. Patterson*, 142.

2. *Murder*—*Indictment as accessory*—*Evidence.*—The prisoner, C., was indicted for aiding and abetting one M. in a murder, of which M. was convicted. It appeared that about six in the evening the deceased was with R. and his wife on the river bank at Amherstburgh,

standing near a pile of wood. She saw M. standing behind the pile, who on deceased going up to him struck deceased with a stick, of which he died; deceased ran, when two other men sprang out and followed him, but in a few seconds two of them returned and assaulted her and her husband. She could not identify the prisoner. Two other witnesses saw the blow struck and identified M.; and one witness, B., swore that about six on that evening deceased left his office with R. and his wife, and that about twenty minutes after he saw the prisoner, with M. and another, go into the vacant lot where the wood-pile was, M. having a stick in his hand, and heard M. say to the others, "Let us go for him." It was also proved by others that the three were together before the affray, and in a saloon together about nine o'clock afterwards.

Held, that there was not sufficient evidence to warrant the prisoner's conviction, for there was no direct proof that he was present when the blow was struck, and no evidence whatever that he and the others were together with any common unlawful purpose; and the words spoken were in themselves unimportant.—*Regina v. Curtley*, 613.

CROWN CASES.

May be set down in New Trial paper.—See PRACTICE.

CROWN LANDS.

1. *Proof of purchase*—*Timber license.*—The plaintiff obtained from a County Crown Lands Agent a ticket stating the amount to be paid into the Bank of Montreal as the first instalment on a lot which he

said he would probably buy. Nearly a month afterwards he paid this sum to the Bank, taking their receipt, which stated that it would appear at the credit of the Crown Lands Department, from which he subsequently received a letter acknowledging the receipt of the money on this lot, and saying that his communication would receive attention. The agent said this was not a sale, and this lot was not in the monthly return of lots sold sent to him from the Department. Defendant held a timber license for this and other lots, but land previously sold was expressly excluded from it.

Held, that the plaintiff was not a purchaser from the Crown, so as to entitle him to recover against defendant, for cutting timber on the lot.—*Wells v. Cumming*, 470.

2. *Possession by purchaser before patent—Right to maintain trespass.*]—The plaintiff held possession of land as purchaser from the Crown under a receipt from the Crown Land Agent, and before defendant entered he had paid up in full, and was entitled to his patent, which however did not issue until some time after. *Held*, that he was entitled to recover against a wrongdoer for trespass committed before as well as after the patent.

Where the trespass had been wilful, and after full notice, the Court refused to grant a third trial, though they considered the verdict very high, and would have been much better satisfied with a much lower amount.—*Nicholson v. Page*, 505.

Proof of plan from Crown Lands Department.]—See EVIDENCE, 5.

See INTRUSION—LICENSE TO CUT TIMBER.

DAMAGES.

Excessive, new trial for.]—See CORPORATIONS—COVENANT—CROWN LANDS, 2—FALSE IMPRISONMENT.

Liability of tavern-keepers for accident, under 27 & 28 Vic. ch. 18, sec. 40—Measure of damages.]—See TEMPERANCE ACT.

See PARTICULARS—SHERIFF, 2—TRESPASS, 2.

DEATH.

Of Division Court Judge—Right of his successor to grant new trial.]—See DIVISION COURTS, 2.

DEED,

Deed in fee reserving the occupation for life—Construction.]—A deed conveying land in fee simple, “reserving, nevertheless, to my” the grantor’s “own use, benefit and behoof, the occupation, rents, issues and profits of the said above granted premises, for and during the term of my natural life.”—*Held*, a conveyance of the fee simple, not a mere testamentary paper which the grantor could revoke by a subsequent deed. *Quære*, whether the reservation was void, or whether only the reversion passed subject to the life estate.—*Simpson et al. v. Hartman*, 460.

Agreement for use of water.]—See WATER, 3.

Construction of—Implied covenant in.]—See COVENANT.

Description of Land in Patent.]—See DESCRIPTION OF LAND.

Of Married Women.—See DOWER—MARRIED WOMEN.

See Alteration—Evidence, 4—Fraudulent Deed.

DEFAMATION.

See SLANDER AND LIBEL,

—
DELAY.

In presenting cheque.—See ACCORD AND SATISFACTION.

In presenting Bank draft.—See MONEY HAD AND RECEIVED, 2.

In moving against Judge's order.—See JUDGE'S ORDER.

In moving to quash By-laws.—See MUNICIPAL CORPORATIONS, 3, 4.
See JUDGMENT (*nunc pro tunc*).

—
DEMURRER.

Judgment on cannot be set aside by Judge unless irregular.—See JUDGE IN CHAMBERS.

—
DEPUTY CLERK OF THE CROWN.

Privilege from Arrest.—See ARREST.

—
DESERTION.

Assisting sailors to desert.—See CRIMINAL LAW, 1.

—
DESCRIPTION OF LAND.

Construction of deed—Falsa demonstratio.—In 1792 lot 17 in the second concession of Harwich was appropriated by the Land Board for the District of Hesse to James O'Brien. He had made no improvements however up to 1794, and in 1853 the location made to him by the board was formally cancelled.

In 1801 a patent issued to F. for 17 in the front concession of Harwich, which had been appropriated to him by the Land Board about a year after their grant to O'Brien, described as commencing in front of the concession at the N. E. angle

of the lot, on the river, then, S. 45° E. 80 chains, more or less, to the lands of James O'Brien; then S. 45° W. 30 chains, more or less, to lot 16; then N. 45° W. 68 chains to the river; then along the water's edge north-easterly to the place of beginning, containing 200 acres more or less. Up to this time there had been no second concession line run.

In 1863, the Crown granted to defendant the rear part of the lot, 188½ acres, and the plaintiff, claiming it under the patent to F, brought trespass.

Held, that as O'Brien never got a patent or became entitled to claim one, the reference to his land was *falsa demonstratio*, and that the plaintiff was confined to the distance of 80 chains mentioned in the patent to F. *Fields v. Miller*, 416.

—
DESJARDINS CANAL CO.

1. *Desjardins Canal—Railway bridge over.*—*Held*, that by the various Acts of Parliament referring thereto, the erection of the defendants' drawbridge over the Desjardins Canal was sanctioned and recognized; and that it must be assumed to have been lawfully erected, though the formalities required by secs. 136, 137, and 138, of *The Railway Act* might not have been complied with.

Held, also, that the first count of the declaration, charging defendants with neglect and refusal to open the bridge and permit vessels to enter or leave the canal, was defective in not alleging that it was not at such times being actually used by defendants for the passage of their trains; and that the second count was good. *The Desjardins Canal Company v. The Great Western Railway Company*, 363.

2. *Obligation to repair bridge—Evidence—Placita and continuances—Practice.*—The Desjardins Canal Company having been indicted for not keeping in repair the bridge over their canal where it crosses the highway, built for them by the Great Western Railway Company: *Held*, that they, and not the Railway Company, were bound to keep such bridge in repair.

Held, also, that evidence of the state of the bridge a few days before the trial was admissible, not as proof of that fact, but as confirming the other witnesses who swore to its state at the time laid in the indictment, and as showing such state by inference.

Held, also, no objection that the proceedings on the record were in the Court of Queen's Bench for the Province of Ontario, there being no such Province when they were had, for the mention of the Province was surplusage; nor that there were no second *placita* or continuances on the record, for, if necessary, an amendment would be allowed.

Remarks as to objections taken in the rule, but not appearing on the Judge's notes. *Regina v. Desjardins Canal Co*, 374.

DISTRESS.

See LANDLORD AND TENANT, 1—
LICENSE TO SELL LIQUORS.

DIVISION COURTS.

1. *Examination of defendant—Commitment—Pleading—Practice.*]

—The plaintiff demurred to the replication to a plea justifying an arrest under an order to commit, issued by a Division Court for disobedience of an order to pay

a judgment debt within a named time. Defendant joined in demurrer and excepted to the plea:

Held, as to the plea—1. That it was unnecessary to state the proceedings before judgment, so as to give the Division Court jurisdiction, the amount stated being clearly within it.

2. That the issue of execution in due course, and its delivery to the plaintiff and return, were sufficiently stated.

Semble, that the issue and return of execution is not, under the Division Courts Act, a condition precedent to the examination of defendant.

It was alleged that when the summons to examine issued the plaintiff resided in the county, but not that he continued so resident at the issue of the summons to commit. *Held*, sufficient, for this would be presumed.

It was not averred that the plaintiff was examined on oath before the Judge, or any other evidence adduced. The warrant, set out in the replication, recited that it appeared to the satisfaction of the Judge that he had contracted the debt under false pretences. *Held*, sufficient, for it is not necessary in all cases to take evidence on oath, and the Judge might have acted on the plaintiff's admission.

Semble, that the omission of the Clerk to enter an order of commitment in the procedure book, could not affect a defence under such warrant.

Held, also, that the Judge had power to make an order to pay in nine weeks or for commitment on default; and as a summons and order to commit issued before the plaintiff's arrest, it was immaterial that the first order had not been en-

tered, or that three months had elapsed after it before the warrant issued.

The order to pay or for commitment issued in May. In October, on the return of a summons, an order was made to commit for non-appearance and disobedience of the order to pay. The warrant of commitment recited that the order of May issued because it appeared to the satisfaction of the Judge that the plaintiff had incurred the debt under false pretences, and that on the return of the summons in October he had not appeared. *Held*, that the ground for commitment sufficiently appeared. *Peck v. McDougall*, 353.

2. *Application for new trial — Death of Judge — Power of his successor — C. S. C. chap. 5, sec. 6, sub-sec. 23.*]—A suit in the Division Court having been tried on the 18th of July, before a Deputy Judge duly appointed, on the 22nd the defendant duly applied for a new trial, by which, under rule 52 of the Division Courts, proceedings were stayed. The Judge died on the 26th; the Deputy Judge before whom the case had been tried did nothing in the matter; and the new Judge was not appointed until October. In January following he ordered a new trial.

Held, that he was authorized to do so, under sec. 107 of the Division Courts Act, Consol. Stat. U.C. chap. 19, and the Interpretation Act. Consol. Stat. C. chap. 5, sec. 6, sub-sec. 23, taken together. *In re Swanton, plaintiff, and Baker, defendant*, 486.

A discharge under the Insolvent Act does not prevent a party from being committed upon a Judgment

Summons under the Division Courts Act.]— See *INSOLVENT*, 4.

DOWER.

1. *Settlement in lieu of — Possession by demandant.*] — Dower. Equitable plea, that by deed, before and in consideration of the demandant's intended marriage, it was agreed between her and her intended husband, that certain lands should be conveyed by him after marriage to trustees, to his use for life, then to her use for life, then to the use of the issue of the marriage, and in default of such issue to his heirs; that after the marriage the lands were accordingly so conveyed, and the demandant after her husband's death became seized and entered into possession of such lands under the settlement in lieu and satisfaction of her dower in all his lands, according to said settlement.

Held, on demurrer, a bad plea, for there was no provision express or implied that such settlement was to be in lieu of dower; and the allegation of entry in lieu, the land being her own, could make no difference.

There was also a plea that demandant had been in possession of the land in which dower was claimed since her husband's death.— *Held*, no bar, for this could not deprive her of her right to have dower assigned — *Gilkison v. Eliott*, 95.

2. *Certificate of exomination — Proof of residence.*] — A certificate on a deed executed in 1816, to which the wife of the grantor was not a party, stated that "on the 30th May, 1829, personally came before me, A. F., Judge of

the Midland District Court, Mary, wife of the within named Robert McNally," and being examined, &c., consented to be barred of her dower. The grantor was described in the deed as of the Town of Kingston, in the County of Frontenac.

It was objected that the wife did not appear to have been resident in the county when the certificate was given; but, *Held*, otherwise, for the presumption was that she resided with her husband, and that his residence continued the same.

Held, that the 2 Vic. ch. 6, sec. 4, clearly removed any objection, on the ground that she was not a party to the deed. *Hunter v. Johnson*, 14 C. P. 128, remarked upon.—*McNally v. Church*, 103.

3. *Practice—Service of declaration—Costs.*—Plaintiff in dower having served a demand on defendant, the tenant of the freehold, residing in Scotland, served the declaration and notice to plead on the tenants in possession of the land, and on this entered judgment by *nil dicit* against the defendant for seizin and costs, and issued execution. The Sheriff delivered possession according to the report of the commissioners appointed, under 24 Vic. ch. 40; and their fees, including the charge of the surveyor employed by them, amounted to \$266. An order was afterwards made to refer this charge to taxation, on a summons calling on the Sheriff and the commissioners and surveyor, but not on the plaintiff.

Held, that the judgment was irregular, and must be set aside, for service of the declaration on the tenants of the land could not enure

as a service on the defendant, the tenant of the freehold.

Semble, under the Dower Act, the tenant of the freehold can be sued only when within the jurisdiction; if out of it, then a mere occupier may be sued, but a recovery against him will not bind the right of the tenant of the freehold.

Quere, as to the defendant's right to sign judgment by default for the costs; but assuming such judgment to be valid, *Held*, that the costs of the commissioners, under 24 Vic. ch. 40, would be recoverable against defendant.

Held also, that the order to refer could not be sustained, for the defendant should have been a party to the summons.—*Gourlay v. Gourlay*, 178.

DRAINAGE.

See WATER, 1, 2.

EJECTMENT.

See MORTGAGE, 2—SURVEY.

ESCAPE.

See SHERIFF, 2, 4.

ESCROW.

See ALTERATION—PRINCIPAL AND SURETY.

ESTATE.

Deed of fee simple, reserving occupation for life.—See DEED.

See WILL.

ESTOPPEL.

See FALSE IMPRISONMENT.

EVIDENCE.

1. *Admission by pleading.*—In an action by the plaintiff for wages earned as a lumberman, the dispute being whether the person hiring him was the defendant's agent, the defendant pleaded a set-off, and at the trial attempted to prove under it that the plaintiff had received goods from the store at the shanty.

Held, reversing the judgment of the County Court, that no inference could be drawn from this as an admission by the defendant of his liability for the plaintiff's wages.

Held, also, affirming the judgment below—1. That the statements made by L. & M., under the circumstances set out in the case, were properly received.

2. That it was allowable to prove by persons working with the plaintiff that they had been paid by the defendant on application to him, and that in suits brought by them against him he had paid money into Court; and that the judgments in such suits were also admissible, though unnecessary.

3. That a memorandum in defendant's writing, unsigned, and attached to a bill of sale relating to the timber, was also admissible.—*Stewart v. Scott*, 27.

2. *Comparison of writings—Practice.*—When collateral issues arise out of comparison of hand-writing, and evidence in relation to them becomes admissible at a stage of the cause when it would otherwise be excluded, such evidence should be treated as applicable to the case generally, when it properly applies to it.

Plaintiff sued as indorsee of a

promissory note. A witness for defence said he thought the signature of the indorser not genuine. On cross-examination he was asked whether two signatures on a paper shewn to him were the indorser's, and he said he thought not. In reply the plaintiff proved that they were, defendant objecting to such proof as being in support of the plaintiff's original case. It was received at the trial for the purpose of impeaching the witness, but withheld from the jury as evidence to sustain the plaintiff's case.

Held, that being admissible for one purpose, it was evidence generally in the cause, and should have been so left to the jury.—*The Royal Canadian Bank v. Brown et al*, 41.

3. *Written contract—Parol evidence.*—The plaintiff sued defendants upon a contract by them to purchase from him four thousand barrels of crude petroleum, claiming damages for the loss of a large quantity destroyed by an accidental fire, and which he alleged should have been previously taken by them under the agreement, which bound them to take it as fast as their barrels could be received, emptied and returned. The defendants refused to accept, on the ground that the oil was not of the quality contracted for.

Held, that evidence was inadmissible that, in conversation shortly before the written agreement, the defendant spoke of receiving six or seven car loads per week; and such evidence having been received a new trial was granted without costs.—*Noble v. Spencer et al*, 210.

4. *Forgery—Declaration of subscribing witness—Admissibility of memorial.*—The execution of a re-

lease of dower being disputed, the defendant proved the handwriting of P., the subscribing witness, who was dead. The defendant, who alleged the release to be a forgery, offered to prove a declaration by P. that he had left the country because he had forged the defendant's name.

Held, following *Stobart v. Dryden*, 1 M. & W. 615, that such evidence was rightly rejected.

Semble, that the memorial of the release, dated the day after it, with the affidavit of execution made by P., was admissible, as part of the *res gestæ*, and as shewing that P. had sworn to the execution; but if irrelevant and inadmissible, the other evidence well warranted the verdict for the defendant; and *Held*, therefore, that its admission was immaterial.—*Rose v. Cuyler*, 270.

5. *Proof of plan.*—A plan was produced from the Registry office, sworn to be that furnished by the Commissioner of Crown Lands. It was headed "Cardiff," (the name of the Township, (and at the bottom was written "Department of Crown Lands, Ottawa, November, 1866, A. Russell, Assistant Commissioner," whose signature was proved.

Held, sufficiently certified, and receivable in evidence.—*Nicholson v. Page*, 318.

6. *Stakeholder—Indemnity—Misrepresentation—Costs of suit.*—Action by a stakeholder, alleging that he had paid over the wager to the defendant, one of the parties, on his agreeing to indemnify him; that R., the other party to the wager, sued and recovered judgment against the plaintiff, but that defendant did not indemnify. De-

fendant pleaded that the plaintiff falsely represented to him that R. had not demanded the wager from him, and that on the faith of such statement he promised to indemnify.

The plaintiff produced an exemplification of the judgment recovered against him by R., the pleadings and issues in which shewed that the jury must have found a demand by R. This, it was contended, was evidence of such demand in this action; but *Held*, that at all events it would not prove defendant's plea, which was not supported by the other evidence.

Held, also, that the costs of the suit brought by R. could be recovered on the evidence.—*Maybee v. Turley*, 444.

7. *Ejectment—Judgment and executions—Secondary evidence of.*—Where the papers belonging to the District Court and to the Sheriff had been destroyed by fire—*Held*, in ejectment, that the defendant, claiming under a Sheriff's deed, might prove the judgments and executions by secondary evidence contained in the Sheriff's books and in a fee book of the Court, and by the plaintiff's attorney in the judgment, whose papers had also been burned, and by the plaintiff, and that he was not bound to obtain exemplifications.

The plaintiff having slept upon his rights for nearly twenty years, and the jury having found for the defendant upon the secondary evidence of deeds and papers set out in the case, the Court refused to interfere.

Held, also, that the judgment creditor, the defendant's grantor, who had purchased under execution an undivided half, and claimed

the whole under a deed from the plaintiff, was clearly a competent witness.—*Heany v. Parker*, 509.

Of purchase of Crown Lands.]—
See CROWN LANDS, 1.

Proof of plaintiff being the holder of a note,]—See BILLS OF EXCHANGE, 1.

Of being accessory to murder.]—
See CRIMINAL LAW, 2.

*Of hiring.]—*See WORK AND LABOUR, 1, 2.

Of acceptance of an agreement.]—
See R. W.'s AND R. W. COS., 1.

See ACCORD AND SATISFACTION—
ARBITRATION AND AWARD—FALSE
IMPRISONMENT—INTRUSION—LAND-
LORD AND TENANT, 2—MARRIED
WOMEN—PLEADING—PRINCIPAL
AND SURETY—RAILWAYS & RAIL-
WAY COS. 1—REGISTRAR—SHIPS, 1, 2
TRESPASS, 1—TROVER.

EXAMINATION OF DEFEND- ANT.

See DIVISION COURTS, 1.

EXECUTION.

*Secondary evidence of.]—*See EVIDENCE, 7.

*Fi. fa.]—*See SHERIFF, 1.

*Capias.]—*See SHERIFF, 2, 4.

*Priority of.]—*See SHERIFF, 3.

EXECUTOR.

See ADMINISTRATOR.

EXEMPLIFICATION.

Of judgments and executions—
*When essential as evidence.]—*See
EVIDENCE, 7.

FALSA DEMONSTRATIO.

See DESCRIPTION OF LAND.

FALSE IMPRISONMENT.

Misnomer—Inconsistent defences—
Excessive damages]—The plaintiff,
Campbell, who lived at Montreal, was
arrested at Kingston, upon a warrant
reciting that *R. B. Boman* had been
charged, &c, for that he, the said —
Campbell did, &c., and commanding
the arrest of the said *R. B. Boman*.
The information was against *R. B.*
Boman, the name of *Campbell*
having been struck out. In an
action for false imprisonment and
malicious prosecution, it was proved
that the plaintiff was known as
Campbell, but carried on business
as *R. B. Boman & Co*. At the
trial it was objected that the count
for malicious prosecution would
not lie, there having been no criminal
offence charged. This was
conceded, and both sides agreeing
that it must be trespass or nothing,
it was left to the jury to say whether
all or any of the defendants were
guilty. The jury having found for
the plaintiff—

Semble, that the defendants having
abandoned all defence under
the proceedings before the magis-
trate, could not afterwards, in term,
be permitted to urge that trespass
would not lie for that there was an in-
formation and warrant and defend-
ants were not responsible for the
magistrate's act in ordering the
arrest; but

Held, that the information and
warrant could afford no justification,
for they were against *Boman*, not
the plaintiff; and though the plain-
tiff had entered his name as "*R.*
B. Boman" in the hotel where he
was staying, there was nothing to

shew that he had ever represented that to be his name, and he was known to the hotel-keeper and bar-keeper as Campbell.

Held, also, that the evidence, set out below, was sufficient to go to the jury, to connect all the defendants with the arrest.

The plaintiff when arrested was bailed to appear next morning, and the case was then dropped. The jury having given \$500, the Court refused to interfere for excessive damages.—*Campbell v. McDonell, et al.*, 343.

FENCES.

Duty of railways to erect.] — See NEGLIGENCE, 2, 3.

Liability to keep up.]—See RAILWAYS AND RAILWAY CO'S, 2.

FOREIGNER.

Quere, if liable under Insolvent Act.] — See INSOLVENT.

FORGERY.

Evidence of.]—See EVIDENCE, 4.
See ARBITRATION AND AWARD, 1.

FRAUD,

Cannot make an express contract an implied one.] — See COMMON COUNTS.

See INSOLVENT, 2, 3—MUNICIPAL CORPORATIONS, 5.

FRAUDS (STATUTE OF.)

See ADMINISTRATOR.

FRAUDULENT DEED.

Conveyance—Whether fraudulent as against creditors.]—V., in 1852, con-

veyed land to his intended wife upon certain trusts, by which, if he survived her, the property was to revert to him for life, for his own maintenance and the maintenance and education of the issue of the marriage, if any, and failing such issue, and after his and her death, to go to his right heirs. In October, 1857, in consideration of £50, he conveyed to S., his father-in-law, all his interest in the premises, his wife and two children being then alive, and two children were born afterwards. All these children died before their mother, and she died in 1861. He admitted that in October, 1857, he was apprehensive of difficulty, though he did not consider himself insolvent, and no executions issued for some time after; and in March, 1858, he made an assignment for the benefit of his creditors. He said that the £50 was paid to him; and that the object of the deed, as he told S., was to secure any interest he might have in the land for the benefit of his wife and family; and he took a lease from S. subject to rent, which had not been demanded or paid.

S., who died in 1859, devised his interest in this land to his wife for life, and she brought ejectment against a purchaser of V.'s interest under execution, who contended that the deed of 1857 was void as against creditors.

It was left to the jury to say whether the deed was *bonâ fide* for a good consideration, or a mere fraudulent contrivance to defeat creditors; and they found for the plaintiff.

Held, that the direction was right, and the verdict was upheld.

Wood v. Dixie, 7 Q. B. 892, followed *Smith v. Morton, et al.*, 195.

FRAUDULENT REPRESENTATION.

See MUNICIPAL CORPORATIONS, 5.

GENERAL ISSUE BY STATUTE.

See PLEADING.

GOODS SOLD.

See COMMON COUNTS.

GOOD WILL,

Sale of by Administratrix.]—See ADMINISTRATOR.

GRAND TRUNK RAILWAY COMPANY.

Liability to keep up fences of the Buffalo and Lake Huron Railway.]—See RAILWAYS AND RAILWAY CO'S.

GREAT WESTERN RAILWAY COMPANY.

See DESJARDINS CANAL COMPANY—NEGLIGENCE, 2.

GUARANTEE.

Construction.]—Defendants on the 20th April, 1867, guaranteed, in writing, the payment to the plaintiff, a nursery gardener, of his account against H. for nursery productions to be delivered to H. that Spring, said payment to be made to the plaintiff by H. or the defendants within twenty days after receipt of the trees by H.

On the 4th February preceding an agreement under seal had been executed between the plaintiff and H., that the plaintiff should deliver trees at railroad stations, at the prices mentioned, in such quantities as H. might sell, for which H.

agreed to pay one-half ten days after delivery of the trees, and to give his note endorsed for the balance, payable in six or eight months from delivery, or the notes of the purchasers.

In an action on the guarantee it appeared that the balance due by H. in all, for deliveries after the guarantee, was \$460.22, of which \$60 was due on the cash part of the transaction, and only this part had been entered by the plaintiff in his day book; for the rest he held purchasers' notes.

Held, that the guarantee clearly could apply only to the \$60.—*Leslie v. Long and Mair*, 482.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 2.

HUSBAND AND WIFE.

See DOWER—MARRIED WOMEN.

INDICTMENT.

Under Con. Stat. U. C. ch. 100, sec. 2, for assisting sailors to desert.]—See CRIMINAL LAW, 1.

INDUCEMENT.

See PLEADING.

INFANT.

Mortgage by—Avoidance of.]—See MORTGAGE, 2.

INSOLVENT.

1. *Insolvent Act 1864—Foreigners—Practice.*]—The plaintiff had been engaged in business in Canada, though not permanently resident

there. He was arrested by the defendant, a constable, who took possession of money found on him, and being discharged he sued the defendant for the money. A writ of attachment having issued against him, one M. was appointed official assignee, and applied, under sec. 4, sub-sec. 9 of the Insolvent Act of 1864, to be allowed to intervene and represent the plaintiff in the suit. The plaintiff objected, contending that as a foreigner he was not liable to the Insolvent laws.

The point being one of great practical importance, raised for the first time, the Court, with a view to have it properly brought up, left the assignee to sue the defendant for the money, so that the defendant might apply under the Interpleader Act, and the question be presented on the record in a feigned issue.—*Mellon v. Nicholls*, 167.

2. *Insolvent Act — Discharge — Fraud.*]—To a plea of discharge under the Insolvent Act, confirmed by the Judge, the plaintiff replied a corrupt agreement between the insolvent and D. & Co., parties to the deed of composition and discharge, that in consideration of executing it D. & Co. should receive an additional sum above the composition, for which the insolvent gave them his note; and that the plaintiff and other creditors had no knowledge of such agreement until after the confirmation.

Held, a good answer: the confirmation not being made conclusive by the Act, under such circumstances.—*Thompson v. Rutherford*. 205.

3. *Chattel mortgage—Insolvent Act 1864, sec. 8, sub-secs. 1, 2, 3, 4.*]—Declaration in detinue and trover for goods. Plea, that one J., the

owner, being a debtor unable to meet his engagements and in contemplation of insolvency, mortgaged the goods to the plaintiff, and within thirty days thereafter made a voluntary assignment in insolvency to the defendant, the official assignee; that the mortgage was made to the plaintiff as a creditor of and surety for J., whereby the plaintiff obtained an unjust preference over J's other creditors, who were thereby injured and obstructed, wherefore the mortgage was void, and the defendant as assignee took the goods.

The plaintiff replied that J. being a retail dealer, and wanting goods to carry on his business, asked the plaintiff to endorse notes to enable him to purchase them: that the plaintiff consented, on condition that J. on receiving the goods should secure him against loss by a mortgage thereon, and on the other goods in J's store, who was to sell them at his store only, and out of the proceeds retire the notes, and if he should sell otherwise the plaintiff might sell the goods for his own protection; that the plaintiff accordingly endorsed, and J. with the notes purchased goods, which he mortgaged to the plaintiff, as agreed on, with other goods, for the *bonâ fide* and sole consideration of perfecting the said agreement: that J. afterwards, without the plaintiff's consent, assigned to the defendant, who took with notice of the mortgage, and was proceeding to sell the goods, when the plaintiff forbade him, and demanded them.

Held, that the replication was good, for that the plaintiff only became a creditor by the actual transaction, in which he gave the equivalent in the new goods purchased procured on his credit; and under

these circumstances, the plaintiff being ignorant of J.'s position, the mortgage was not avoided by the Insolvent Act, (sec. 8, sub-secs. 1, 3, 4), though its effect might be to delay creditors.

Quære, whether it was voidable under sub-section 2.—*Mathers v. Lynch*, 244.

4. *Division Court — Judgment summons—Commitment under—Effect of discharge under Insolvent Act.*—A discharge under the Insolvent Act does not prevent a party from being committed upon a judgment summons under the Division Courts Act.

If it did, a party applying for protection from arrest should shew clearly that the name of the plaintiff was in his schedule, and this is not sufficiently done by putting in a copy of the schedule, without swearing that the plaintiff's name is there.—*In re Muckay et al. v. Goodson*, 263

See MALICIOUS PROSECUTION—SHERIFF. I

INSURANCE.

1. *Alienation—Equitable Replication—Insurable interest.*—Declaration on a policy of insurance on the plaintiff's interest in a mill. Plea, that before the loss the plaintiff had sold and conveyed his interest in the property to one B., without notice to the defendants or their assent. Replication, on equitable grounds, that the conveyance to B. was only to secure him against loss as surety for the plaintiff, who always continued in possession, and no loss had accrued to B.; and that one F. was entitled to the benefit of the plaintiff's covenant to insure, contained in a mortgage of the

property made to him by the plaintiff before the conveyance to B., and this action is brought on F.'s behalf as well as the plaintiff's.

Held, on demurrer, a good replication, for it shewed an insurable interest in the plaintiff cognizable in a Court of Law; and the unnecessary statement of F.'s interest could not affect it.—*Smith v. The Royal Insurance Company*, 54.

2. *Termination by insurers.*—A fire policy provided that, if for any cause they should so elect, it should be optional with the Company to terminate the insurance after notice given to the insured of their intention to do so, in which case they should refund a ratable proportion of the premium. Defendant, in a plea under this condition, alleged that before the fire they elected to terminate the insurance, and gave notice to the plaintiff of their intention to do so, and did *thereby* terminate the said insurance; and, after the said termination, and before the loss, tendered to the plaintiff a ratable proportion of the premium, which he refused to accept. It was objected, on demurrer, that the condition required a termination *after* election and notice, but

Held, that the plea was good.—*Cain v. The Lancashire Insurance Company*, 217. See No. 4.

3. *Proof of loss—What may be required—Condition—Construction of.*—The plaintiff sued on a policy which required the insured, in the event of loss, to deliver as particular and accurate an account thereof as the case would admit, and produce such other evidence as the directors, &c., should reasonably require. The house insured was burned on the 21st August,

1867. On the 5th October the plaintiff sued, and on the 9th he furnished a builder's certificate of the value of the building, which had been required by the defendants before the action.

Held, that such certificate was reasonable evidence to require; that being demanded before action, the plaintiff could not sue without giving it; and that, in the absence of any special circumstances, the question whether it had been required within a reasonable time did not arise.

Whether the condition authorized the demand of such certificate was a question for the Court, though whether what was furnished complied with the requisition might be for the jury.

The demand was made by the defendants' inspector, whose duty was to visit the agencies and adjust losses. It was objected that only the directors could make it; but *Held*, sufficient, they having adopted the Inspector's Act.—*Fawcett v. The Liverpool, London and Globe Insurance Company*, 225.

4. *Condition for terminating risk—Construction—Evidence.*—A condition endorsed on an insurance policy provided that, if for any cause the Company should so elect, it should be optional with them to terminate the insurance upon notice given to the insured or his representatives of their intention so to do, in which case the Company should refund a ratable proportion of the premium.

Held, not essential that the notice should precede the termination of the insurance, but that they might be contemporaneous, and that the Company could terminate the risk, by giving notice that they did so,

and refunding the unearned premium.

Held, also, that in this case, on the facts set out, there was evidence for the jury to shew a termination of the risk under the condition.—*Cain v. The Lancashire Insurance Company*, 453.

5. *Plea of arson—New trial refused—Condition—Leaving premises unoccupied.*—In the absence of misdirection, where the jury find in favor of a party on an issue charging him with a criminal offence, the Court will rarely grant a new trial.

In this case, in an action on a fire policy, defendants gave such evidence to shew that the house had been burned by one K., by the plaintiff's procurement, as would well have warranted a finding for defendants. K., however, had been indicted for the arson and acquitted. The jury having found for the plaintiff the Court refused to interfere.

The policy provided that in case of any alteration or addition, &c., or change in the nature of the occupation, or in any other manner whatsoever, by which the degree of risk was increased and a consequent additional premium would be required, the insurance should be void in default of notice and allowance thereof. Defendants alleged, as a breach of this condition, that the premises which, when insured, were occupied by the plaintiff's tenant, became vacant and unoccupied without defendants' knowledge or consent, whereby the risk was increased and an additional premium would have been required, and that the plaintiff did not give notice of this change, nor was it allowed by defendants.

Held, that the plea was bad, for the mere ceasing to occupy was not within the condition. The jury also found the plea not proved.—*Gould v. The British America Assurance Company*, 473.

See CONTRACT, 1—LIMITATIONS (Statute of)—TROVER.

INTERPLEADER.

See INSOLVENT, 2.

IRREGULARITY.

In signing judgment.]—See COUNTY COURTS, 3.

INTRUSION.

On an information for intrusion upon land of the Crown,—*Held*, there being no proof that the Crown had been out of possession for twenty years, that under not guilty defendant could not give evidence of title under a Crown lease.

Held, also, that the Crown, on this plea, were not entitled to judgment at once, but must go down to trial to shew the intrusion and damages, and because the defendants under the plea might shew the Crown out of possession for twenty years, and thus put the Crown to proof of title.—*The Queen v. Sinnott*, 539.

JUDGE IN CHAMBERS.

Semble, that a Judge in Chambers has no power to set aside a judgment on demurrer, regularly signed after argument. — *Ross et al. v. Grange*, 306.

JUDGE'S ORDER.

Practice—*Moving against Judge's order*—*Chambers*—*Jurisdiction.*]—

A Judge's order must be moved against in the term next after it is made; and it was held no ground for relaxing this rule, that the motion had been erroneously made in the Practice Court in the first instance.

Semble, that a Judge in Chambers has no power to set aside a judgment on demurrer regularly signed after argument.—*Ross et al. v. Grange*, 306.

JUDGMENT.

See COUNTY COURT, 3—EVIDENCE, 6, 7—JUDGE IN CHAMBERS—JUDGE'S ORDER—SHERIFF, 2.

JUDGMENT NON OBSTANTE.

See NEW TRIAL, 2.

JUDGMENT NUNC PRO TUNC.

Practice—*Entering judgment nunc pro tunc.*]—The plaintiff on the 22nd March, 1866, obtained a verdict, and died on the 26th June, having in April previous assigned the verdict to one C.

On the 24th September a rule *nisi* for a new trial was discharged, and in October C. proceeded to enter judgment. The Master refused to tax full costs, and on application to the Judge who tried the case he desired to hear the defendant's attorney. Notice of an appointment to argue the matter was given, but owing to enlargement or to the absence of the Judge from Chambers it was not argued until February, and a certificate was granted in April. Application was then made in Chambers to enter judgment *nunc pro tunc*, but the summons stood over by consent, and in August, 1867, C.,

having been appointed the plaintiff's administrator, renewed the application in Chambers, which was refused on the 2nd October.

The Court, under the circumstances, made absolute a rule to enter such judgment, without costs.

—*Neil v. McMillan*, 257.

JURISDICTION.

See JUDGE IN CHAMBERS--JUDGE'S ORDER.

LANDLORD AND TENANT.

1. *Lease—Eviction from part—Right to distrain.*—Defendant leased certain premises to the plaintiff by deed for three years, there being at the time another person in possession of a part as a monthly tenant, who was afterwards succeeded by two others, holding under the defendant.

Held, affirming the Judgment of the County Court, that the lease to the plaintiff being under seal, operated as a grant of the reversion (with the rent incident thereto), as to the part thus held, and that the defendant was entitled therefore to distrain for the whole rent in arrear.

Kelly v. Irwin, 17 C. P. 365, remarked upon, and not followed, — *Holland v. Vanstone*, 15.

2. *Agreement — Construction — Lease or sale—Payment of rent to mortgagee—General averment of performance of conditions.*—Defendant signed the following memorandum: "I agree to pay S. M. Fairbairn," (the plaintiff), "£50 cy., for his right to the house I live in, the farm at present occupied by me, known as the Morrison Farm, and the stables now used by me, for six months from the 1st April next."

Held, evidence of a letting by plaintiff to defendant, not of a sale.

One L., who held a mortgage on the premises, executed and overdue before the lease, notified defendant to pay the rent to him instead of to the plaintiff, threatening distress and ejectment on default. Defendant thereupon attorned to L., and paid him the £50. *Held*, that such payment constituted a good defence to an action by plaintiff against defendant for the rent.

If the memorandum had shewn a sale, so that the plaintiff would have been bound to tender a conveyance—*Semble*, that such tender must have been alleged in the declaration, and would not be included in the general averment that "all things happened," &c., for such averment covers only conditions precedent to be performed by plaintiff under the agreement.—*Fairbairn v. Hilliard*, 111.

LEASE.

See LANDLORD AND TENANT.

LEX LOCI CONTRACTUS.

Note payable in the United States, but not "not otherwise or elsewhere," the currency of the place of contract must govern.—See BILLS OF EXCHANGE, 2.

LIBEL.

See SLANDER AND LIBEL.

LICENSE TO CUT TIMBER.

1. *C. S. C. ch. 23.*—A license to cut timber, under Consol. Stat. C. ch. 23, has by the Statute the effect of a grant of the timber cut, and though not under seal it is not re-

voked by the issuing of a patent for the land.—*McMullen v. Macdonell*, 36.

2. *Inconsistent surveys*—“*General course*” of a river.]—The plaintiffs held a license, dated in September, 1860, to cut timber within certain limits, commencing “at the south branch of the Indian river, at the extremity of a limit licensed to A. & Co., ten miles above the forks.” In 1842 a survey had been made by the Deputy Inspector of Woods and Forests, to determine A. & Co.’s limits, when the upper end, where the plaintiffs began, was marked by blazed trees; and in 1844 this survey was completed by one R., under instructions from the department, and the line previously marked was then adopted, and recognized until March, 1867. In that month a surveyor was instructed by the department to determine the defendant’s limits, which were the same as those of A. & Co., and he made the upper boundary not so far from the forks as the previous surveys. His plan was returned to the department, but no action taken on it. The plaintiffs then sued the defendant for cutting timber on the strip between the two surveys, the trespasses complained of having been committed apparently before the last survey was made.

Held, that they could not recover, for R.’s survey having been adopted and acted on by the Government, the boundary marked on the ground in accordance with it must govern until changed by competent authority.

Quære, how a boundary line following “the general course of the river” for a given distance is to be ascertained, and whether it is pro-

perly done by drawing a straight line from the starting point to a point on the river at that distance.

Quære, whether, as was assumed in this case, the holder of a license which has expired may sue for trees cut during its currency.—*White et al. v. Dunlop*, 237.



LICENSE TO SELL LIQUORS.

1. *Selling liquors without license*—*Form of conviction and warrant of distress*—*Pleading*.]—On demurrer to an avowry justifying under a conviction for selling spirituous liquors without license, and a distress warrant issued thereon—

Held, 1. That it was sufficient to state the offence in the conviction as selling “a certain spirituous liquor called whisky,” though the clause, (29-30 Vic., ch. 51, sec. 254) creating the offence says “intoxicating liquor of any kind”; for intoxicating liquors and spirituous liquors are used in the Act as convertible terms; and in the Customs Act of the same session whisky is recognized as a spirituous liquor.

2. No objection that the proceedings were not stated to have been begun within twenty days from the offence, for the fact appeared on the face of the conviction.

3. The offence alleged was selling “a certain quantity, to wit, one pint.” *Held*, sufficient, without negating that it was a sale in the original packages, within the exemption in sec. 252, for it would be judicially noticed that a pint was less than five gallons or twelve bottles, which such packages must at least contain.

4. No objection that the costs of conveying the defendants to gaol,

in the event of imprisonment in default of distress, were specified.

As to the other objections suggested, it was held a sufficient answer that the conviction followed the form prescribed by the Act Consol. Stat. C. chap. 103, which was intended as a guide to magistrates and to prevent failure of justice from trivial objections.

As to the form of the warrant, *Held* unnecessary to allege that it was under seal, or that it was directed to any one, it being averred to have been duly issued and delivered for execution to defendant M., the constable.

Held, also, that the avowry, set out below, sufficiently shewed that defendant M. was a constable, and that it was delivered to him for execution.

Held, also, that the mention in the warrant of the \$1 for costs of conveying defendants to gaol could not vitiate, for it authorized a distress only for the penalty and costs of conviction. *Reid v. McWhinnie and Martin*, 289.

See MUNICIPAL CORPORATIONS, 1.

LIMITATIONS, STATUTE OF.

Mutual Insurance Companies—Limitation of Action—Imprisonment of plaintiff—29 Vic. ch. 37, sec. 3.—A. insured with a Mutual Insurance Company, by a policy expiring on the 26th June, 1863. The 29 Vic. ch. 37, passed on the 18th September, 1865, enacted that no suit should be brought on any policy after one year from the loss, or one year from passing the Act, if the loss had happened before, *saving the rights of parties under legal disability.*

To a plea that the loss happened before the Act, and that the action was not commenced within one year from its passing, defendant replied that when the Act was passed A. was in prison (not saying for felony), and continued there until his death on the 21st February, 1867, and that the action was commenced within a reasonable time after his death.

Held, that the replication was no answer to the plea.—*Tallman et al., executors, v. The Mutual Fire Insurance Company of Clinton*, 100.

MALICIOUS PROSECUTION.

Maliciously issuing attachment—Insolvency—Defects in the process.—The first count was for maliciously making affidavit of debt, of the plaintiff's insolvency, and of his intention to remove and dispose of certain goods with intent to defraud defendants, and thereby procuring an attachment, and the plaintiff to be declared an insolvent—alleging that the attachment and proceedings were afterwards set aside. The second count was in trespass for seizing plaintiff's goods.

Held, as to the first count, that the fact of the affidavit of defendants' agent as to removal of the goods not being corroborated by two witnesses as required by the Act, was no objection, for by the form of action the plaintiff conceded the process to have been legal, and relied on its having been issued maliciously.

On the second count, the jury were told that if the attachment had been set aside, the plaintiff was entitled to a verdict; and the plaintiff objected that as the setting aside had been proved, it should not have been left as if open to doubt. The

jury having found for defendants,—*Held*, that the charge was unobjectionable; and as on the evidence nominal damages only would have been sufficient, the Court refused to interfere. *Eaton v. the Gore Bank*, 490.

MANDAMUS.

See SHERIFF, 1.

MARKETS.

By-law regarding.—*See* MUNICIPAL CORPORATIONS, 6.

MARRIED WOMEN.

1. *Conveyance by married woman in 1821—Certificate of examination.*—A conveyance of land in the Eastern District by a married woman, executed on the 8th October, 1821, had endorsed upon it this certificate: "Personally appeared this day, in open session, the within named E. B., wite of J. B., who being duly examined touching her consent to alien and depart with her lands within mentioned, declared that she freely and voluntarily," &c. "Given under my hand in open Court, this 10th October, 1821, (Signed), Joseph Anderson, Chairman."

It was proved that Joseph Anderson was Chairman of the sessions, being usually chosen so, though not the Judge of the District Court. The defendant objected that the certificate did not state that she appeared and was examined in open Court, nor that it appeared to the Court that she freely, &c., nor that the Court was held in and for the Eastern District; nor did it appear that she was then

over the age of twenty-one; but *Held*, (the execution of the deed being proved by its age,) having regard to the intention of the Legislature to do away with the effect of informalities (C. S. U. C. ch. 85, sec. 13), that the certificate, with the evidence, was sufficient.—*Morgan v. Sabourin et al.*, 230.

2. The certificate on a married woman's deed, twenty-five years old, signed by two justices, was as follows:

MIDLAND DISTRICT, } "Be it re-
To Wit: } membered
that on the 8th May, 1843, R. G., wife of the within-named L. G., who being examined by us separate and apart from her said husband, touching her consent to surrender and give up to the within-named H. S., his heirs and assigns, all her right and title," &c., &c.

3. *Held*, sufficient—for, 1. It was immaterial that the certificate was not endorsed on the deed but written in the margin on the face of it. 2. The venue sufficiently shewed where the examination took place; and an admission which was made of the justices' authority must be taken to mean their authority as justices for that district. 3. As the names of the two witnesses to the deed were the same as these of the justices, and the handwriting similar, and the date of the deed and certificate the same, it might be inferred that the execution took place in their presence. 4. The words "surrender and yield up" were equivalent to the statutory phrase "depart with."

4. The motion being for a nonsuit, as there was thus evidence from which a jury might have found the requirements of the Acts

complied with, the rule was discharged.—*Simpson et al. v. Hartman*, 460.

See DOWER.

MASTER AND SERVANT.

Common employment—Liability of employer.—See NEGLIGENCE, 1.

See WORK AND LABOR

MEASURE OF DAMAGES.

See SHERIFF, 2 — TEMPERANCE ACT OF 1864.

MEMORANDA.

Barristers called, 35, 153, 424, 562.

Appointment of Attorney-General for Ontario, 35.

Appointment of Queen's Counsel, 35, 153.

Appointment of Judges, 562.

Rule of Court, 559.

MEMORIALS.

Of deeds—Admissibility of as evidence.—See EVIDENCE, 4.

MERGER.

Mortgage given as collateral security for bills of exchange.—See MORTGAGE, 1.

MILL.

Agreement as to use of water to drive.—See WATER, 3.

MISNOMER.

See FALSE IMPRISONMENT.

MISREPRESENTATION.

See EVIDENCE, 6 -- MUNICIPAL CORPORATIONS, 5.

MONEY.

Note payable in the United States, but "not otherwise or elsewhere," the currency of the place of contract must govern.—See BILLS OF EXCHANGE, 2.

MONEY HAD AND RECEIVED.

1. *Receipt of notes to collect—Unauthorized sale—Liability of Defendant.*—Plaintiff gave two notes against F. to the defendant, a Division Court Clerk, to collect, and to apply on a note for \$300 which the plaintiff owed to the defendant. The defendant sold the two notes to one M., guaranteeing their recovery, and M., having recovered judgment against F., but made nothing thereon, obtained back from the defendant what he had paid. Defendant transferred the note for \$300 to T., who sued the plaintiff thereon and recovered judgment.

Held, that the plaintiff could recover from the defendant the money received by him from M. as money had and received, for the defendant had no authority to make the conditional transfer; and as F's notes were extinguished by the judgment recovered on them, and the holder of the plaintiff's note had recovered judgment against him, the defendant had rendered it impossible to restore the plaintiff to his original position.—*Moorman v. Farmer*, 1.

2. *Grammar school Money—Receipt by County Treasurer—Liability and right of action for.*—There being in a village a Joint Board of Grammar and Common School Trus-

tees, on the 7th July the Chairman of the Board of Grammar School Trustees received a circular from the education office, advising him of the payment of \$202 for that school. This money had been paid into the Bank of Upper Canada at Toronto as agents for defendant, the Treasurer of the County, prior to its suspension, and the Bank sent him an order on their Hamilton branch, which was not presented before the Bank stopped payment in September. It was not asked for until the 25th September, when the Treasurer of the Joint Board called for it. On the 26th defendant wrote to the Treasurer of the Joint Board enclosing this draft, saying that it had been received by him for the grammar school, and had been lying in his office for their demand as usual since the 11th July. The plaintiffs having refused to accept the draft :

Held—1. That an action for this money would lie against defendant as Treasurer, it having been paid to his agents at Toronto, and he having admitted its receipt for the special purpose.

2. That as the Board of Grammar School Trustees, notwithstanding the Union, still existed as a separate corporation, the action should have been by them, not by the Joint Board.

3. If the action had been rightly brought, defendant would have been liable for the loss on the draft, for the payment was made to his agents at Toronto in money.—*The Joint Board of Grammar and Common School Trustees of the village of Caledonia v. Farrell*, 321.

See MUNICIPAL CORPORATIONS, 5
—SHERIFF, 3—TAXES, 3.

MORTGAGE.

1. *Bills of exchange—Mortgage as collateral security—Construction—Merger—Pleading.*—The defendant owing the plaintiff a large sum on bills of exchange, some overdue, some maturing, gave him a mortgage on land, reciting the debt on the bills and the plaintiff's agreement to accept further security by way of mortgage, and containing a proviso that it should be void on payment of the bills, and a further proviso that on default of payment for twelve months the plaintiff might, on giving six months' notice, enter and sell the lands. The mortgage also contained a covenant to pay the bills. In an action on such covenant, with counts upon the bills—

Held, 1, That there was clearly no merger of the claim upon the bills.

2. That the proviso as to default and notice applied only to the remedy against the lands.

Defendant in his plea, after setting out the mortgage and proviso, and averring that the plaintiff had not given the six months' notice, concluded, "and so the defendant had not made default before the commencement of this suit." *Held*, that as the notice was unnecessary the plea was not proved. *The Gore Bank v. Eaton*, 332.

2. *Infant—Avoidance of deed by Ejectment—Tenants in common—Will—Construction.*—A mortgage of land given by an infant is voidable only, not void; but it may be avoided during infancy, and, defending by guardian, an action of ejectment brought by the mortgagee is a sufficient act of avoidance.

Where the action was against three, and two claimed only under the in-

fant, admitting the plaintiff's right to two undivided thirds, but denying ouster: *Held*, that as the infant's right to one-third was established, the plaintiff without proof of ouster could not recover against the others.—*Gilchrist v. Ramsay, et al.*, 500.

Payment of rent to mortgagee.]—*See* LANDLORD AND TENANT, 2.

MUNICIPAL CORPORATIONS

1. *Tavern and saloon licenses*—13 & 14 Vic. ch. 65.]—*Held*, that under 13 & 14 Vic. ch. 65, the Municipal Corporations had power to discriminate between the different kinds of public houses, and that they were authorized therefore to charge differently for a saloon and a tavern license, and to require different accommodations.—*In re Grand and The Corporation of the Town of Guelph*, 46.

2. *Original road allowance—Trees taken from—Right of Municipalities to recover for*—C. S. U. C. ch. 54, secs. 314, 331, sub-sec. 5—*Competency of witness.*]—*Held*, that a township corporation, without having passed any by-law on the subject, could maintain trespass for cutting and carrying away trees growing upon Government allowances for roads; for the power to pass by-laws for preserving or selling such trees gave them also the right to recover from a wrong-doer their value, which right might be exercised without any by-law.—*The Corporation of the United Townships of Burleigh, Anstruther, Chandos, Cardiff, Harcourt, Bruton and Monmouth v. Hales et al.*, 72.

3. *Town Hall—By-law to erect—Provision for payment.*]—A By-law for the construction of a new town hall in a township, passed on the

22nd May, 1867, was moved against, on the ground that it authorized expenditure for a purpose not under the head of ordinary expenditure, without having money in hand or making the necessary provision by rate or otherwise to meet the demand. It appeared however that the sum required was included in the annual by-law for the year, passed on the 19th August, 1867, upon an estimate previously made, also including it, which the applicant had voted to adopt; that the town hall had been completed, accepted and paid for, and the land on which it stood conveyed to the corporation.

Under these circumstances the rule to quash the by-law was discharged with costs.—*Gibb and the Corporation of the Township of Moore*, 150.

4. *Town Hall—By-law to erect—Provision for payment.*]—A township corporation passed a by-law on the 15th June, 1867, authorizing the purchase of a site for, and the erection of a town hall, but not making provision for meeting the expense, for which it did not appear that there were surplus moneys on hand. On the 31st of August they passed the annual by-law for ordinary expenditure, and, in addition to the sum required therefor, provided by the same by-law for raising the amount required for the site and building. On application to quash these by-laws, it appeared, in answer, that the site had been conveyed to the corporation and paid for, and the hall completed, and that there were funds in the treasurer's hands to pay for it.

Held, that although the corporation might not have been strictly

regular the by-laws should not now be quashed, and the rule was discharged, but without costs.—*Grant and the Corporation of the Township of Puslinch*, 154.

5. *Councillor giving untrue orders as for "work done"—Right of action by Corporation against him—Proof of fraud—Notice of action—Common counts.*—The declaration alleged that defendant, as agent for the plaintiffs, undertook to expend certain moneys for them on certain roads and bridges; that he falsely and fraudulently represented to them that he had caused work to be done; and in collusion with the persons alleged to have done such work, and by drawing false orders in their favor containing such representations, caused a certain sum to be drawn out of the plaintiffs' treasury; whereas the work had not been done, and the plaintiffs thus lost the money. Common counts were added.

It appeared that the corporation by one resolution directed that \$300 should be granted to each Councillor, defendant being one, to be by them expended on the roads; and by another that \$100 should be placed to the credit of each Councillor, to be expended by them on the roads and bridges in their respective divisions. This was in accordance with an established practice, by which the Councillors superintended the laying out of moneys in their respective divisions. Defendant granted several orders on the Treasurer to different persons as for "work done," which were paid, and it appeared that such work, *though contracted for*, had not then been performed. There was no evidence, however of any fraud or collusion on defendant's

part, or of any gain to himself, except the usual charge to the corporation of the commission on such moneys as expended.

The jury having found for the plaintiffs, on a direction that moral fraud was necessary to sustain the action:

Held, that though giving orders false in fact might raise a *prima facie* case, yet the proof that the work had been contracted for rebutted the charge of fraud. A new trial was therefore granted without costs.

Held, also, that there could be no recovery on the common counts, for defendant had received no money.

Held, also, that defendant was not entitled to notice of action, for he was not acting in the performance of any public duty cast upon him by law.

Quære, whether this action would lie by the Corporation against one of its members, or whether the proper remedy was not in equity, against defendant as a trustee.

Quære, also, whether it could be said that the money was obtained by means of the untrue orders, for defendant, having the control of the money by the resolutions, might legally make payments in advance, and the orders would equally have been paid if they had shewn that the work was only in progress or contracted for.—*The Corporation of the Township of Chatham v. Houston*, 550.

6. *Markets*—29–30 *Vic. ch. 51, sec. 296, sub-sec. 12*—31 *Vic. ch. 30, sec. 32.*—The Corporation of a town by by-law enacted that no butcher, huckster, or runner, should buy or contract for any kind of fresh meat, provisions, &c., such as were usually sold in the market, on the roads,

streets, or any place within the town, or within one mile distant therefrom, between certain hours in the day :

Held, clearly unauthorized, for their power (under 29-30 Vic. ch. 57, sec. 296, sub-sec 12, as amended by 31 Vic. ch. 30, sec. 32), extends only to butchers living in the town or within a mile of its limits.

The rule *nisi* to quash the by-law was entitled "In the matter of — appellant and — respondent:" *Held*, no objection.—*McLean and The Corporation of the Town of St. Catharines*, 603.

MURDER.

See CRIMINAL LAW, 2.

NAVIGATION.

See SHIPS, 2.

NAVY.

Assisting sailors to desert.—See CRIMINAL LAW, 1.

NEGLIGENCE.

1. *Railway—Contributory negligence—Negligence of fellow servant—Common employment.*—Plaintiff as administratrix sued the defendants for the death of her husband, caused by a railway accident. It appeared that deceased, with three others and a foreman, were employed with a hand-car in clearing snow from the track near Limehouse station. The foreman saw a freight train approaching at speed a quarter of a mile off, upon which he left the men, telling them "to clear," and walked towards it waving a flag. Two of the men stepped aside when

it came up, but deceased and the other man ran in front of it along the track, until it drove the hand-car against and killed them both :

Held, clearly a case of contributory negligence on the part of deceased ; and a non-suit was ordered.

One of the brakesmen on the train swore that the brakes were defective, and that the train could not therefore be stopped in obedience to the proper signal, which was up. It appeared, however, that the defects mentioned by him could have been removed by tightening a bolt or shortening a rod, which any one employed by the defendants could have done in a few minutes ; and other witnesses swore that with the brakes as they were after the accident the train could have been stopped, that it came up at a speed shewing no intention to stop at all, and with the engine reversed ran a quarter of a mile past the station, and that at the next station, on the same grade, and with the same brakes, it was stopped without difficulty :

Held that these facts conclusively shewed the negligence not to have been that of the defendants, but of their servants engaged in a common employment with deceased, and for which therefore defendants were not responsible.—*Plant, Administratrix v. The Grand Trunk Railway Company of Canada*, 78.

2. *Railway accident—Contributory negligence—Obligation to fence.*—The plaintiff being in a cab, approached a railway crossing, where a train could be seen at a distance of three-quarters of a mile. The driver, however, who knew the crossing well, did not look out at all until within about twenty yards of the track, and then only straight

in front of him. He did not see the train, which was a very long one, consisting of twenty passenger cars and two engines, until the horses' feet were on the rails, and it was within seventy feet, and he then tried to cross in front of it, but the cab was struck and overturned. The plaintiff, from within, had seen the train approaching, and called to the driver to stop, but a man sitting on the box with him urged him to go on, which he did :

Held, that the driver's negligence was so far the cause of the accident that the plaintiff could not recover, notwithstanding the defendants' neglect of their statutory obligation to have a fence and gate at the crossing, with an attendant to watch it. A non-suit was therefore ordered.

Such obligation was assumed in deference to decided cases. *Quære*, however, whether the Statute imposes it.—*Nicholls v. The Great Western Railway Company*, 382.

3. *Railway accident—Contributory negligence—Obligation to fence.*—In this case also, upon substantially the same evidence as the last, it was held that the plaintiff could not recover.

The jury were directed, that if they were satisfied the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff. *Held*, a misdirection, for that if the driver by his negligence contributed to the accident, so that but for his want of reasonable care it would not have happened, the plaintiff could not succeed.—*Rastrick v. The Great Western Railway Co.*, 396.

Proof of.—See SHIPS, 2.

See PLEADING.

NEW TRIAL.

1. *Excessive damages*]—Where the trespass had been wilful, and after full notice, the Court refused to grant a new trial, though they considered the verdict very high, and would have been much better satisfied with a much lower amount.—*Nicholson v. Page*, 505.

2. *Promissory notes—Set-off—Issue taken on bad plea—Practice.*]—To an action on promissory notes against maker and indorser, the latter pleaded a set-off in the common form, for work done by him for the plaintiffs—a plea held bad on demurrer in *Hughes v. Snure*, 22 U. C. R. 597. The plaintiffs however did not demur, but took issue, and on the trial the jury found the plea proved. A verdict having been directed for the plaintiffs, with leave to move to reduce it by the amount of set-off proved, a rule was obtained by the defendants on this leave, and a cross-rule by the plaintiffs for a new trial on the evidence.

The Court made the latter rule absolute, but on payment of costs by the plaintiffs, as the whole difficulty had been caused by their going to trial on an insufficient plea.

Semble, that if the evidence had supported the plea, the rule to reduce would have been made absolute, and the plaintiffs allowed to move for judgment *non obstante*—following *Lumby v. Allday*, 1 C. & J. 301. *Commercial Bank of Canada v. Harris et al.* 526.

For excessive damages.]—See COVENANT.

Third trial refused for excessive damages.]—See CROWN LANDS, 2.

Granted after the death of a Judge by his successor.]—See DIVISION COURTS, 2.

For reception of improper evidence
—See EVIDENCE, 3.

For excessive damages.] — See
CORPORATIONS—COVENANT—CROWN
LANDS, 2—FALSE IMPRISONMENT.

Rarely granted after verdict for a
a party on issue charging him with a
crime.]—See INSURANCE, 5.

See CRIMINAL LAW, 1—EVIDENCE,
4, 7—MALICIOUS PROSECUTION—
MUNICIPAL CORPORATIONS, 5—
PRACTICE—SHIPS, 1—SURETY—
TRESPASS, 3—USURY.

NEW TRIAL PAPER.

See PRACTICE.

NON EST FACTUM.

See PRINCIPAL AND SURETY.

NOT GUILTY.

Evidence admissible under.]—See
PLEADING.

NOTICE

To justice, of application by prose-
cutor for a certiorari to remove a con-
viction unnecessary. — See CONVIC-
TION, 2.

NOTICE OF ACTION.

See MUNICIPAL CORPORATIONS, 5.

PARTICULARS.

Particulars are not to be constru-
ed with the strictness applicable to
a count on a special contract. *The*
Northern Railway Co. v. Lister, 57.

For goods furnished — Construc-
tion of.]—See CORPORATIONS.

Delivery of for breaches of patent.]
—See PATENT FOR INVENTION,

PARTNERSHIP.

See SHERIFF, 3.

PATENT FOR INVENTION.

Scire facias to repeal—Delivery
of particulars — Practice — C. S.
C., ch. 34, sec. 20, sub-sec.
2.] — The effect of Consol. Stat.
C. ch. 34, sec. 20, sub-sec. 2,
enacting that the proceedings on a
writ of *Scire Facias* to repeal a pa-
tent shall be “according to the law
and practice of the Court of Queen’s
Bench in England,” is to introduce
the Imperial Act 15 & 16 Vic. ch.
83 :

Held, therefore, that leave to de-
liver particulars of the breaches,
which should have been delivered
with the declaration could only be
granted as if the declaration were
delivered *de novo*; that as the jury
had been sworn, and this therefore
could not be done, a verdict was
properly directed for the defendant.

The Court, however, upon affi-
davit, allowed the plaintiff to deliver
particulars on terms.—*The Queen*
v. Hall, 146.

PATENT (FOR LAND).

See DESCRIPTION OF LAND.

PAYMENT.

See ACCORD AND SATISFACTION—
MONEY HAD AND RECEIVED.

PLAN.

From Crown Lands Department—
Proof of.]—See EVIDENCE, 5.

PLEADING.

In pleading the general issue by
Statute, any Statute relied upon for

the defence must be referred to in the margin, as well as that by which such plea is allowed.

But where such a Statute had been omitted in the County Court, this Court, on appeal, directed the Court below to amend by inserting it.

Where, in the inducement of the declaration, it was alleged that the defendants were proprietors of the railway, not saying at the time of the negligence complained of. *Held*, that under an ordinary plea of not guilty, defendants might shew that at such time it was not their property.—*Van Natter v. The Buffalo and Lake Huron Railway Company*, 581.

Plea justifying arrest under commitment by a Division Court, for disobedience of order to pay—Requisites of.—See DIVISION COURTS, 1.

See ACCORD AND SATISFACTION—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2—CO-OPERATIVE ASSOCIATIONS—DESJARDINS CANAL CO. 1—DIVISION COURTS—INTRUSION—LANDLORD AND TENANT, 2—LICENSE TO SELL LIQUORS—LIMITATIONS (*Statute of*)—MORTGAGE, 1—NEW TRIAL, 2—PRINCIPAL AND SURETY—RAILWAYS AND RAILWAY CO'S—SLANDER AND LIBEL, 1, 2.

PRACTICE.

Crown cases—New trial paper.—*Semble*, that the Court may direct Crown cases to stand in the new trial paper for argument, with ordinary suits between party and party.—*The Queen v. Sinnott*, 531.

Entitling motion paper and rule on application to quash a conviction.—See CONVICTION, 1.

Entitling rule nisi on application to quash By-law.—See MUNICIPAL CORPORATIONS, 6.

On applications to quash convictions convicting justice must be made a party to the rule.—See CONVICTION, 3.

Omission of placita or continuances on the record.—See DESJARDINS CANAL CO., 2.

Examination of defendant.—See DIVISION COURTS, 1.

Judge in Chambers has no power to set aside a judgment on demurrer regularly signed after argument.—See JUDGE IN CHAMBERS.

See COUNTY COURTS, 3—DOWER, 3—EVIDENCE, 2—INTRUSION—JUDGE'S ORDER—JUDGMENT, *nunc pro tunc*—NEW TRIAL, 2—PATENT FOR INVENTION—REGISTRAR.

See VERDICT.

PRESCRIPTION.

See INTRUSION.

PRINCIPAL AND AGENT.

Evidence of agency.—See EVIDENCE, 1.

See SHIPS, 1.

PRINCIPAL AND SURETY.

Action against surety—Plea, non-execution by other intended sureties—Demurrer—Non est factum—Declaration on a covenant by defendant as surety for the payment of rent by one B. *Plea* on equitable grounds, that defendant executed on the understanding and representation that Y., K., and E. should also execute, and that he should be responsible with them and not solely; and that it was represented to him by B. and by the said K. that immediately after defendant's execution the other three would execute. It was then alleged that

they never did execute, and that before any breach, and with all due diligence, he gave notice to the plaintiffs of the premises, and that he claimed to have been released by such non-execution :

Held, on demurrer, that the plea was bad, for there was nothing to connect the plaintiffs with the representations on which defendant executed, and they might have leased to B. on the understanding only that defendant should be surety.

The evidence however supplied this defect, shewing that the representations were made by the plaintiffs' agent when he obtained defendant's signature ; and there was also on the record a plea of *non est factum*.

Held, that the defence was admissible under this plea, as shewing in substance that defendant executed the deed conditionally only, and as an escrow.

Defendants were also allowed to amend the equitable plea in accordance with the evidence, on payment of costs.—*The Corporation of the County of Huron v. Armstrong*, 533.

See ALTERATION.

RAILWAYS AND RAILWAY COMPANIES.

1. *Buffalo and Lake Huron and Grand Trunk Railway Cos.* — *Agreement between under 29-30 Vic., ch. 92—Construction and effect of—Evidence of acceptance of such agreement—Not guilty, by Statute—Appeal from County Court—Amendment.*]—The Grand Trunk and the Buffalo and Lake Huron Railway Companies entered into an agreement, by which the net receipts of the two undertakings were to be divided between them in specified

proportions, the Grand Trunk to have the option, within six years, of purchasing the share capital of the other on certain terms, and the control and working of the B. & L. H. undertaking to be placed in the hands of the G. T., under a joint committee of two nominees from each board : the agreement to subsist for 21 years, during which the B. & L. H. Railway and its appurtenances were to be kept in repair by the G. T.

The 29-30 Vic. ch. 92, confirmed this agreement, and enacted that the G. T. in working the other railway, should have all the powers conferred on the B. & L. H. Co., by Statute or otherwise. It provided, also, that the Act should not come into operation until accepted by the shareholders of the two Companies, and such acceptance certified in the manner directed, of which acceptance and certifying a notice in the *Canada Gazette* should be conclusive proof. By a private Act of the Dominion, afterwards passed, 31 Vic. ch. 19, it was recited that this agreement had been duly accepted.

In an action against the B. & L. H. Co., for an accident caused by defect of fences on their line in 1867, it was proved that the G. T. were supposed to own and were managing and running that railway :

Held, affirming the judgment of the County Court, that on these facts,—either with or without the 31 Vic. ch. 19, which, however, was receivable, and entitled to some weight,—there was evidence for the jury from which an acceptance of the agreement might be presumed.

Held, also, that the G. T. Co., being in possession of and working the railway under the agreement, were bound to fence ; and that the

defendants were not liable.—*Van Natter v. The Buffalo and Lake Huron Railway Company*, 581.

2. *Liability to keep up fences.*—*Held* following the last case, that the Grand Trunk Railway Company, under the agreement with the Buffalo and Lake Huron Railway Company confirmed by 29-30 Vic. ch. 92, were liable for not keeping up the fences along the latter railway. *Holmes v. The Grand Trunk Railway Company of Canada*, 595.

Accident upon—Proof of negligence.—*See NEGLIGENCE.*

Distress for taxes upon land belonging to—Form of avowry.—*See TAXES*, 2.

Obstruction of stream by.—*See WATER*, 2.

See DESJARDINS CANAL Co, 1—PLEADING.

RATIFICATION.

See ALTERATION.

REGISTRAR.

York and Peel—Services of Registrar of Peel under 29 Vic., ch. 24, secs. 26, 33—Joint liability of Counties after separation—Pleading—Evidence.—*Held*, as decided upon demurrer to the declaration, 26 U. C. R. 635, that the Corporations of York and Peel were jointly liable to the Plaintiff, as Registrar of Peel, for services rendered by him under secs. 26 and 33 of the Registry Act, before the separation of the Counties:

Held, also, that a demand of payment on the Treasurer of the Counties and refusal by him was sufficiently shewn by the evidence set out below; and that the Inspector's certificate under sec. 70, though

given after the separation, was sufficient, it not being a condition precedent to the right of action on such refusal.

Held, also, no objection that the memorials copied by the plaintiff had been received by his predecessor, not by himself.—*Campbell v. Corporation of York and Peel*, 138.

RIPARIAN RIGHTS.

See WATER, 1.

ROADS.

See MUNICIPAL CORPORATIONS, 2.

ROAD COMPANY.

See TOLLS.

RULES AND ORDERS.

Rule nisi not signed by Clerk, Effect of.—*See COUNTY COURTS*, 3.

Entitling rule to quash By-law.—*See MUNICIPAL CORPORATIONS*, 6.

RULE OF COURT.

As to Sheriff's fees, 559.

SALE OF GOODS.

See Co-OPERATIVE ASSOCIATIONS.

SALOONS.

See MUNICIPAL CORPORATIONS, 1.

SATISFACTION.

See ACCORD AND SATISFACTION.

SCHOOLS.

See MONEY HAD AND RECEIVED, 2—*TAXES*, 1.

SERVANT.

See MASTER AND SERVANT.

SET-OFF.

See NEW TRIAL, 2.

SHERIFF.

1. *Insolvent—Sale of lands under fi. fa.—Right to proceeds—*29 Vic. ch. 18, sec. 17.]—M., under a *fi. fa.* at his own suit against D, which was the first in the Sheriff's hands, purchased certain land in September, 1867. D. had in April previous made a voluntary assignment, under the Insolvent Act of 1864, to an official assignee, who claimed the proceeds of the sale, under the Amending Act, 29 Vic. ch. 18, sec. 17. M. claimed a conveyance from the Sheriff, crediting the purchase money on his judgment.

The Court, under these circumstances, discharged with costs an application by M. for a mandamus to compel the Sheriff to convey, to which the assignee was no party.—*In re Moffatt and The Sheriff of the County of York*, 52.

2. *Action for escape—Proof of debt—Measure of damages—Right to proceed in original suit.*]—In an action against the Sheriff for a voluntary escape of M., arrested on a *capias* endorsed to take bail for \$150, it appeared that the defendant had permitted M. to go on his depositing \$175, and that the plaintiff had afterwards proceeded with the suit, and entered final judgment in it for his damages, assessed on judgment by default, and costs, about \$270 :

Held, reversing the decision of the County Court, that such judgment was clearly evidence as against the Sheriff of the debt due by M. to the plaintiff.

Semble, that the plaintiff was entitled, under the C. L. P. A., to proceed in the original suit to judgment after M. had escaped ; but if the judgment had been irregular on that ground, *Quære*, whether the Sheriff could raise the objection ; and *Held*, that while unreversed the judgment was at least *prima facie* evidence against him.

Held, also, affirming the judgment below, that the measure of damages was only the sum sworn to (\$150,) and costs up to the time of the escape, not the amount recovered in the suit.

Jonas v. Tepper, 28 L. J. Q. B. 85, followed on this point, in opposition to earlier cases.—*Taylor v. McEwan*, 126.

3. *Executions—Priority—Partnership—Money had and received.*]—The plaintiff, on the 14th April, 1864, gave the defendant a *fi. fa.* against G., S., and L., the defendant then having a writ against G. and L. *ats.* Hingston, and one against G. alone *ats.* F. On the 20th he received a writ against G. and L., *ats.* Harty. G., S., and L. carried on business as G. & Co., each living at a different place, and S. having authorized L. to act for her in the partnership by power of attorney. The plaintiff's judgment and Harty's were both for partnership debts.

On the 5th February, 1864, the firm made an assignment to E., in trust, to pay all their creditors equally. He sold the goods, and on the 14th April, 1864, paid the proceeds to the defendant, who gave a receipt for it, "to be applied to executions in my hands against G. and G. et al." E. had previously telegraphed to the plaintiff's attorney for instructions as to whether he should pay this money to the

Sheriff, and being told to pay him he did so, and took the receipt, not being aware at the time of any execution but the plaintiff's.

On the 20th April, 1864, Harty notified the defendant not to pay over the money as the plaintiff's judgment was invalid, and on the 19th September following, the plaintiff's judgment and execution, and all proceedings subsequent to appearance, were set aside. The plaintiff again proceeded with the action, and on the 4th December, 1864, placed another *fi. fa.* in the defendant's hands, which he returned no goods, having paid over the money to Harty before the plaintiff had recovered judgment. The plaintiff having sued the defendant for not levying, and for money had and received :

Held, that he could not recover : that as to the first count, the execution defendant had nothing in his hands during the currency of the plaintiff's writ, for if the assignment to E. was valid, their estate had vested in him, and if void, they had through E. paid over the money to the defendant, who received it *as Sheriff* for the purpose mentioned in his receipt ; and as to the second count, the defendant was entitled to apply this money as specified in his receipt, and was not bound to wait until an execution came to him against all the members of the firm.—*Clark v. Corbett, Sheriff*, 161.

4. *Arrest on Ca. Sa.—Form of bond to Sheriff—Amount of penalty—Waiver—C. S. U. C. ch. 24.*—Plaintiffs sued the Sheriff for the voluntary escape of M., taken under a *Ca. Sa.* at their suit ; and, in a second count, charged that the defendant took from M. a bond in a

penalty not double the amount for which he was confined, and the sureties not being sufficient, as defendant well knew, and that the defendant fraudulently, wilfully, and corruptly released M. from custody on receiving such bond.

The penalty was in double the amount of debt, costs, and costs of executions, but not including interest to the date of the bond or Sheriff's fees ; and there was no affidavit of execution or justification of the sureties with the bond. It appeared, however, that fourteen months after M. had been released by the defendant, the plaintiffs took an assignment of the bond, which had not been allowed, and recovered judgment on it in their own names against the sureties. The jury having negatived the scienter and fraud :

Held, that the plaintiffs had waived the objections to the sufficiency of the sureties, and to the bond, for they must have been aware of the objections to the bond when they took the assignment, and that it had not been allowed.

Seemle, that the omission to include interest, if essential, is a matter to be considered by the County Court Judge on the application for allowance, on which his decision is final.

The omission of Sheriff's fees was immaterial, for if he was liable for an escape the plaintiffs could not recover them unless they had paid them, which was not pretended here.—*Kerr et al. v. McEwan*, 170.

Rule of Court as to Sheriff's fees.]
—559.

SHIPS.

1 *Ship owners—Liability for supplies furnished.*—Action for pro-

visions furnished by the plaintiffs to steamboats belonging to and run by the defendants. It appeared that the steward of each boat was bound by contract with the defendants to furnish these supplies, but there was contradictory evidence as to the plaintiffs' knowledge of this arrangement, and as to the circumstances under which the goods were ordered and furnished. The jury having found for the plaintiffs:

Held, 1. That upon the evidence set out in the case, a new trial was properly granted in the County Court.

2. That no absolute rule can be laid down as to the liability of ship owners in such matters, but each case must depend on its own facts; and that here the jury should be asked, upon all the evidence and considering the nature of the business, to whom was the credit given, were the parties ordering the supplies the defendants' agents for that purpose within the ordinary rules as to principal and agent, and was the natural inference of the defendants' liability sufficiently rebutted by the plaintiffs' knowledge of the true arrangement?

The manner in which the Appeal Books were written remarked upon. *Cloy et al. v. Jacques et al.*, 88.

2. *Navigation—Collision—Proof of negligence—27-28 Vic. ch. 13, sec. 2, Arts. 16, 19.*—Plaintiff sued defendants for running down his schooner while at anchor, by their steam tug with a raft in tow. It appeared that the schooner while approaching Presqu'isle harbor, which has a narrow channel, in a heavy sea and wind, became unmanageable, and grounded on the north side of the channel, the wind being southerly. Defendants' tug,

with the raft in tow, followed soon after, keeping as near the south side of the channel as she could, and going at a fair rate of speed, but the raft was driven against and sunk the schooner, the captain of the tug not knowing that it was aground. The tug could not have stopped without risking the loss of the raft, and it was alleged that the tow rope could not have been shortened, or speed slackened.

Plaintiff contended that defendants were liable, having violated article 16 of sec. 2 of the Navigation Act, 27-28 Vic. ch. 13, which enacts that every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed; but,

Held, that it was a case within article 19, which directs that in obeying the rules regard shall be had to all dangers of navigation, and to any special circumstances rendering a deviation from them necessary to avoid immediate danger: that it was a question for the jury, under all the circumstances, whether defendants had been guilty of negligence, and that the evidence warranted a verdict in their favor.—*Stratton v. Chaffey et al.*, 515.

SCIRE FACIAS.

To repeal patent for invention.—*See* PATENT FOR INVENTION.

SLANDER AND LIBEL.

Justification—Pleading.—Part of a libel complained of was that the plaintiff had narrowly escaped being indicted for perjury. As to this part defendant justified, alleging that in a certain suit the plaintiff, as plaintiff's attorney therein, in an affidavit for a *Ca. Sa.* had sworn

falsely to certain specified statements made to him by one R.: that defendant in that suit had recovered damages against the plaintiff for falsely and maliciously making such affidavit, and contemplated a prosecution of the plaintiff for perjury, but was dissuaded: *Held*, a good plea.

In the second count, the libel alleged was in part the publication of an affidavit made by R., in which he set out the action against the plaintiff, and the statements sworn by plaintiff to have been made to him by R., and averred that on the trial of that action he, R., had sworn that these statements were false, as in fact they were. Defendant in a plea to this part of the libel, averred that these statements made by R., repeating them, were true: *Held*, sufficient.

In a third count the libel was that the plaintiff, a practising barrister and attorney, was a pettifogger and without character. This defendant justified, by setting out one matter (the suit mentioned in the other pleas) in which the plaintiff was alleged to have acted as charged in the libel: *Held*, bad, for the general charge could not be justified by a single instance.—*Fitch v. Lemmon*, 273.

2. *Construction—Pleading.*—Libel.—The first count set out that the plaintiffs were watchmakers, and sold certain watches made for them in Switzerland, and other superior watches made in England, marking the former with the name of their firm only, adding on the other the words “Chronometer makers to the Queen”. The libel complained of charged in substance that a large proportion of the watches advertised by them were merely Swiss

watches imposed upon the public as English, and at twice their true value.

In the second count the libel alleged charged the plaintiffs with selling their watches made in Switzerland as English, and thus defrauding the public.

The defendants pleaded to each count that the plaintiffs marked their Swiss Watches with the name “Thomas Russell and Sons, London and Liverpool,” not ‘Thomas Russell and Sons’ only, as alleged:

Held, bad, as offering an immaterial issue.

Held, also, that each count shewed a good cause of action.—*Russell et al. v. Wilkes*, 280.

See VERDICT.

STAKEHOLDER.

See EVIDENCE, 6.

STATUTE.

Effect of as evidence.—See RAILWAYS AND RAILWAY Co's, 1.

STATUTES (CONSTRUCTION OF).

Imperial Statute, 6 & 7 Vic. ch. 73.—See Costs.

Imperial Statute, 15 & 16 Vic. ch. 83.—See Patent, for invention.

Imperial Statute, 2 Vic. ch. 6, sec. 4.—See Dower, 2.

Imperial Statute, 13 & 14 Vic. ch. 65.—See Municipal Corporations, 1.

Consol. Stat. C., ch. 23.—See License to Cut Timber.

Consol. Stat. C., ch. 34, sec. 20.—See Patent (for invention).

Consol. Stat. C., ch. 66, secs. 136, 137, 138.—See Desjardins Canal Co., 1.

Consol. Stat. C., ch. 77, sec. 68.—See Survey.

Consol. Stat. C., ch. 103.—See License to Sell Liquors.

Consol. Stat. U. C., ch. 5, sec. 6, sub-sec. 23.—See Division Courts.

Consol. Stat. U. C., ch. 19, sec. 107. See Division Courts.

Consol. Stat. U. C., ch. 24.—See Sheriff, 4.

Consol. Stat. U. C., ch. 35, sec. 44.—See Costs, 1.

Consol. Stat. U. C., ch. 49.—See Tolls.

Consol. Stat. U. C., ch. 54, sec. 174.—See Taxes, 1.

Consol. Stat. U. C., ch. 54, secs. 314, 331, sub-sec. 5.—See Municipal Corporations, 2.

Consol. Stat. U. C., ch. 55, sec. 89.—See Taxes, 1.

Consol. Stat. U. C., ch. 57.—See Water, 1.

Consol. Stat. U. C., ch. 85, sec. 13.—See Married Women.

Consol. Stat. U. C., ch. 100, sec. 2.—See Criminal Law,

Consol. Stat. U. C., ch. 114.—See Conviction, 2.

24 Vic. ch. 40.—See Dower, 3.

27-28 Vic. ch. 13, sec. 5, Arts. 16, 19.—See Ships, 1.

27-28 Vic. ch. 17, sec. 4, sub-sec. 9.—See Insolvent, 1.

27-28 Vic. ch. 17, sec. 8, sub-secs. 1, 2, 3, 4.—See Insolvent, 3.

27-28 Vic. ch. 18, sec. 40.—See Temperance Act.

29 Vic. ch. 18, sec. 18.—See Sheriff, 1.

29 Vic. ch. 22, sec. 14.—See Co-operative Associations.

29 Vic. ch. 24, secs. 26, 33, 70.—See Registrar.

29 Vic. ch. 27.—See Limitations (Statute of).

29-30 Vic. ch. 31, secs. 252, 255.—See License to Sell Liquors.

29-30 Vic. ch. 57, sec. 296, sub-sec. 12.—See Municipal Corporations, 6.

29-30 Vic. ch. 92.—See Railways and Railway Co's, 1, 2.

29-30 Vic. ch. 100, secs. 25, 100.—Criminal Law.

31 Vic. ch. 19.—See Railways and Railway Co's, 1.

31 Vic. ch. 30, sec. 32.—See Municipal Corporations, 6.

STATUTE OF FRAUDS.

See ADMINISTRATOR.

STREAM.

See WATER, 2.

SUBPŒNA.

Non-attendance—Witness fees—Attachment.—A County Court Judge being served with a subpœna *duces tecum* to produce a deed, did not attend; and on motion for an attachment excused his absence on the ground of important private business, urging also that he obtained the deed and became possessed of his information as an attorney, that he had a lien on the deed, and that he was entitled to witness fees as an attorney.

Held, that he was not so entitled, and should have attended; and the rule was made absolute.—*Deadman v. Ewen*, 176.

SURVEY.

Ejectment—Aliquot part of lot—C. S. C. ch. 77, sec. 68.—In ejectment by the patentee of the south-east quarter of a lot, to try a disputed boundary, defendant owning the north-east quarter, the plaintiff's surveyor stated that he ran the east side-line of the lot, divided it into equal halves, and drew a line across the lot on a bearing corresponding to the concession line in the rear, and that of the quarter so ascertained defendant was in possession of eleven acres. He said, however, that he did not know the quantity in the whole lot, which fronted on a river, and there was a jog in the concession line in the rear, for which he had made no allowance.

By the Survey Act, C. S. C. ch. 77, sec. 68, every grant of an aliquot part of a lot shall be construed as a grant of such aliquot part

of the whole, whether more or less than expressed in the grant:

Held, that the plaintiff had not clearly shewn his right to the land claimed, and was therefore not entitled to succeed; but a new trial was granted instead of a non-suit.—*Babaun v. Lauson*, 399.

Inconsistent Surveys.—See LICENSE TO CUT TIMBER, 2.

TAXES.

1. *Assessment—Authority of collector—Form of roll—C. S. U. C. ch. 55, sec. 89; ch. 54, sec. 174.*—A Board of School Trustees in a town passed a resolution stating the sum required for school purposes, of which their treasurer gave notice to the town clerk, verbally or in writing, but not under the corporate seal. The corporation, however, made no objection, and acted upon it as an estimate: *Held*, that though it would have been insufficient on application to compel the town to levy the money, yet an individual rate-payer could not object.

Sec. 24 of the Assessment Act, C. S. U. C. ch. 55, applies to the assessor's roll only, not to the collector's.

Defendant was duly appointed collector of the municipality for the years 1865 and 1866. *Held*,—following *Newberry v. Stephens*, 16 U. C. R. 471, *Chief Superintendent of Schools v. Farrell*, 21 U. C. R. 441, and *McBride v. Gardham*, 8 C. P. 296—that he had authority in 1866 to distrain for the taxes of 1865 upon the owner of premises duly assessed.

Defendant held two rolls, each headed "Collector's Roll for the Town of Belleville," one being also headed "Town Purposes," the other

"School Purposes." In the first, the column headed "Town or Village Rate" contained nothing, but in that headed "Total Taxes, Amount," \$40 was inserted. In the other that column had nothing, but \$16 was in the column headed "General School Rate:" *Held*, insufficient, for there was nothing to shew for what purpose the sum not specified to be for school rate was charged.

Spry v. McKenzie, 18 U. C. R. 165, distinguished.

The omission to set down the name in full of the person assessed was treated as immaterial.—*Coleman v. Kerr*, 5.

2. *R. W. Co. — Assessment — Avowry.*—In avowing for a distress for taxes due upon land belonging to a Railway Company, it is unnecessary to allege that in the assessment the value of the land occupied by the Railway was distinguished from that of their other real property, or that they had no other real property, or that the assessment was communicated to the Company. Such objections should form the subject of a plea.—*The Great Western Railway Company v. Rogers*, 214.

3. *Taxes paid to Sheriff—Liability to County—Non-resident land fund.*—The plaintiff, in order to prevent his lands from being sold under a Treasurer's warrant for taxes assessed upon them as non-resident lands, paid under protest to the Sheriff the sum claimed, including costs, and then sued the County as for money had and received, to recover back part of the amount, consisting of commutation of statute labor, which he disputed:

Held, that he could not recover, for the Sheriff was not the agent

of the defendants, and there was nothing to shew that he had paid it over to their Treasurer.

The non-resident land fund is so far the property of the County that they may be liable for it in such an action.—*Robertson v. The Corporation of the County of Wellington*, 336.

TAVERNS.

See LICENSE TO SELL LIQUORS.]
—MUNICIPAL CORPORATIONS, 1.

TAVERN KEEPER.

Liability of under 27 & 28 Vic. ch. 18, sec. 40.]—*See* TEMPERANCE ACT.

TAXATION.

See COSTS, 2.

TEMPERANCE ACT OF 1864.

27-28 *Vic. ch. 18, sec. 40*—*Death by "accident"—Meaning of—Damages.*]—The Statute 27-28 *Vic. ch. 18, sec. 40*, makes a tavern-keeper liable in case any person, while in a state of intoxication from excessive drinking in his tavern, has come to his death, "by suicide or drowning, or perishing from cold, or other accident caused by such intoxication."

The deceased in this case being intoxicated fell off a bench in the bar-room, and was placed upon the floor in a small room adjoining, with nothing under his head. While there he died from apoplexy, or congestion of the brain, brought on, as the plaintiff alleged, by placing him in an improper position while intoxicated:

Held, not a case of death by "accident" within the Statute, but of

death from natural causes induced by intoxication.

Whether under this Act proof of some pecuniary damage must be given, or whether, without it, the damages are fixed by the Act at not less than \$100, was a question raised, but not decided.—*Bobier, Administrator of Henry Bobier v. Clay*, 438.

TENANTS IN COMMON.

Ejectment by.]—*See* MORTGAGE, 2.

TIMBER LICENSES.

See LICENSE TO CUT TIMBER.

TOLLS.

Road company—C. S. U. C. ch. 49.]—Plaintiffs were a road company incorporated under Consol. Stat. U. C. ch. 49. The road ran easterly towards Yonge Street till it came to a concession line running north and south, and then along this line to the south a distance of 737 yards, where it ended. The main toll-gate was placed across their road just before it touched the concession line turning south, and they afterwards put a bar on the north side of their road across the concession line where it entered from the north, at which they claimed to collect toll from persons travelling north and south.]—*The Yorkville and Vaughan Plank Road Co. v. Baldwin*, 494.

TOWN HALL.

See MUNICIPAL CORPORATIONS, 3, 4.

TREES.

Cutting on government allowances for roads—Right of action for.]—*See* MUNICIPAL CORPORATIONS, 2.

TRESPASS.

1. *Seizure under fi. fa.—Evidence to connect defendant.*]—*Held*, following *Kennedy v. Patterson*, 22 U. C. R. 556, that accepting and contesting an interpleader issue could not make an execution creditor a trespasser by relation, or liable for the original seizure.

Where either the execution plaintiff or his attorney direct the seizure of particular goods they are liable, but not where the writ is given to the officer to be acted upon in the usual course, and with no special directions.

The unnecessary length of the appeal books in this case remarked upon.—*Phillips v. Findlay*, 32.

2. *Tenant of land—Action of trespass by—Proof of plaintiff's interest—Measure of damages.*]—In an action of trespass to land, where the plaintiff is a tenant only, the duration of his term must be shewn, the measure of damages being the diminished value of his interest.

The trespass complained of was removing a fence in May 1866. The plaintiff's landlady swore that she leased the place to the plaintiff in November, 1865, and added, "Plaintiff was my tenant when the rails were taken away, paying so much a year, taxes and statute labor." There was no further evidence as to the nature of the lease or duration of the term :

Held, that the damages should not, as a matter of law, have been nominal only, but estimated on the injury the loss of the fence would cause to the plaintiff during the five or six months for which he then had a right to possession.—*Fisher v. Grace*, 158.

3. *To land—Proof of title.*]

—In an action against defendant for cutting timber on the plaintiff's land, the plaintiff, to prove title, produced the patent to himself, giving no proof of any prior right by license of occupation or lease from the Crown. *Held*, that his title must be presumed to have begun only at the date of the patent ; and the jury having evidently given damages for trees cut before that day, the Court ordered a new trial unless the plaintiff would consent to reduce the verdict to a sum specified.—*Nicholson v. Page*, 318.

Municipal Corporation may maintain, for cutting trees on Government allowances for roads, without a by-law.]—See MUNICIPAL CORPORATIONS, 2.

Verdict for \$175, but title to land not brought in question, does not carry full costs without certificate.]—See COSTS, 2.

Right of purchaser from Crown Lands to bring trespass before patent.]—See CROWN LANDS, 2.

Right of holder of Timber License to maintain.]—See LICENSE TO CUT TIMBER.

See DESCRIPTION OF LAND—FALSE IMPRISONMENT.

TROVER.

Evidence of conversion—Property afterwards burned—Receipt by Plaintiffs of insurance money.]—Plaintiffs had a large quantity of wheat in the warehouse of one T., for which they held his receipt, and defendants also held T's receipt for wheat in the same place, on which they had made advances ; but there was not enough wheat to satisfy both. T. having left the country, gave

R., defendants' agent, a letter to C., who was in charge of the warehouse, directing him to give R. possession of the warehouse and all grain in it belonging to him, T. On receiving this letter C. gave R. the key, went with him into the warehouse and pointed out T's wheat, and received back the key, agreeing to hold possession. On the same day R. again got the key to go into the place with one M., and again returned it to C., who said he considered he still had possession of the store, and that he would not have given up the wheat to the plaintiffs if R. had so directed him. Plaintiffs demanded their wheat from R., who, as they alleged, answered "I won't do so at present," but almost immediately after defendants' attorney served a written disclaimer on the plaintiffs, informing them that defendants disclaimed all possession of the storehouse and wheat therein. On the same day the plaintiffs brought trover :

Held, assuming the facts most favourably for the plaintiffs, that it should have been left to the jury to say whether R. entertained a *bonâ fide* doubt as to the plaintiffs' right to the wheat, and whether a reasonable time had elapsed for clearing it up; and *Quare*, whether the facts could legally suffice to establish a conversion.

Evidence was rejected that the plaintiffs had insured the wheat sued for and had received the insurance money, the fire having taken place two days after the alleged conversion. *Semble*, that such evidence should have been received, as shewing the plaintiffs' conduct and dealing with regard to the property after the alleged conversion, and thus being relevant to the is-

sue.—*Gilpin et al v. The Royal Canadian Bank*, 310.

USURY.

New trial.]—To an action on promissory notes amounting to \$10,000, defendants, among other defences, pleaded usury, consisting of a charge of $\frac{1}{4}$ per cent. made by the plaintiffs on cheques. When the case was called on no one appeared for the defendants, and the plaintiffs had a verdict.

The Court refused to relieve the defendants on the merits, except on condition of their withdrawing the plea of usury, *Commercial Bank v. Harris et al*, 301.

VERDICT.

Slander—Sealed verdict — Practice—Costs.]—The trial of an action for slander having been concluded, the Court adjourned at 6 p. m., both parties agreeing to a sealed verdict. A sealed envelope was left with the Sheriff's officer for the Judge, with a paper enclosed, signed by all the jury, directing that the defendant should "pay the sum of \$1 damages and the costs of the suit."—*Held*, that on this being opened in Court by the Judge next morning, the jury should have been called together, as the plaintiff's counsel required, to assent to the verdict, and have it recorded; and it having been simply endorsed on the record as written, a new trial was ordered without costs,

Held, also, that the jury had no power to give costs by their verdict. *Campbell v. Linton*, 563.

WAGES.

Evidence of hiring.]—See WORK AND LABOR, 1, 2.

WAIVER.

See SHERIFF, 4.

WATER.

1. *Surface water—Obstruction—Right of action.*]—The plaintiff owned land south of and higher than the defendant's land, and the surface water in the Spring and Fall drained off in a channel of no definite width from the upper part of his lot to the lower, and thence to defendant's land into a pond from which no exit was proved, and which, with the rest of the low land, was usually dry from April till November. The plaintiff had dug a ditch to facilitate the drainage through his own land, and defendant, three or four years ago, had allowed him to plough a furrow in his land with the same object. This the defendant afterwards obstructed, and the plaintiff sued :

Held, that there was no right of action, for he was not a riparian proprietor, there was no proof of any easement, and no natural drainage at the spot obstructed until the ditch was dug there.

Semble that the plaintiff's proper remedy was under the Act respecting Line Fences and Water Courses C. S. U. C. ch. 57.—*McGillivray v. Millin*, 62.

2. *Surface water—Rights to the flow of.*]—The plaintiff alleged that he was possessed of land through which a stream was accustomed to flow, and away from which the surface water was accustomed to escape, and that defendants negligently constructed an embankment on their railway across said land, by not providing sufficient openings to allow the water to escape. The jury found that "there was a stream

of water, and it was obstructed by the railway."

There was a creek on the plaintiff's land, which clearly had not been interfered with ; and the only obstruction shewn was of such a stream as a general flow of surface water would present on a gradual slope of land :

Held, that the word stream in their finding must be taken to mean such water ; and that as the plaintiff shewed no right to the land on both sides of the embankment, nor any easement over the land on the other side, he had no right of action,

The right of drainage of surface water does not exist *jure naturæ*, and the principles applicable to streams of running water do not extend to the flow of surface water.—*Crewson v. The Grand Trunk Railway Company*, 68.

3. *Deed—Construction—Agreement as to use of water.*]—M. conveyed to W. certain premises "together with the privilege of using the water in the pond for the purpose of manufacturing cloth and otherwise howsoever, when and at all times when water is and remains in said pond sufficient for the driving and running the machinery of a grist mill, the property of the grantor, and the fulling and carding machine hereby sold to said W." M. covenanted that W. should have the privilege of using the water for said purpose "when and at all times when water is and remains in said pond sufficient for the driving and running the machinery of a grist mill, the property of said M., and the said fulling and carding machine hereby sold to said W. Provided always, that when and whenever there is a scarcity

of water in the said mill pond, the said W. shall be at liberty to use only so much of the water in the said pond as shall be sufficient to turn one water wheel:"

Held, that M. was entitled to sufficient water to drive his mill before the defendant could use any; and that the defendant was not by the proviso entitled at all events to enough to turn one water wheel. *Craske v. Huffman et al.*, 116.

WILL.

Under a will directing that the testator's estate should be charged with the support of his wife during her life or widowhood, and devising it to his sons in fee, "subject to the devise hereinbefore contained in favor of my dear wife:" *Held*, that the widow took no legal estate. *Gilchrist v. Ramsay et al.*, 500.

See DEED.

WITNESS.

1. In an action by a Township Corporation for cutting trees on road allowances—*Held*, that a person who when the suit was brought was entitled by agreement with the plaintiffs to 25 per cent of the amount recovered for trees taken from such allowances, but who before the trial had released his right as regarded the land in question, was a competent witness.—*The Corporation of Burleigh et al. v. Hales et al.*, 72.

2. *Witness — Competency.*—In an action by the endorsee of a note, the payee, being called as a witness and examined on his *voir dire*, said he owed the plaintiff \$100, and that as there was no one to prove the case against the defendants but

himself, he advised the plaintiff to take this note from him, on which about \$270 was due, so that he could give evidence: that for the balance over \$100 the plaintiff gave him his note, which the witness said at the trial he did not intend to sue upon in the event of the plaintiff failing in this action, although he could not say there was any bargain to that effect.

Held, that the payee was a competent witness. *Shannon v. Daly et al.*, 458.

Non-attendance of County Court Judge on subpoena.—See SUBPENA.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1—EVIDENCE, 7.

WORDS.

"*Accident.*"—See TEMPERANCE ACT OF 1864.

"*General course of a river.*"—See—LICENSE TO CUT TIMBER, 2.

WORK AND LABOUR.

Relationship—Evidence of hiring.—The plaintiff sued her brother for wages during several years that she had lived with him on his farm, keeping house for him while he was unmarried:

Held, that from this alone the law would not, under the circumstances, imply a promise to pay; and there being no other evidence of any hiring or promise, that there was nothing to go to the jury.—*Redmond v. Redmond*, 220.

2. *Action by son against father for wages—Proof of hiring.*—In an action by a son against his father for wages, the only evidence tending to establish the relation of em-

ployer and employed, beyond the fact of the plaintiff having worked, was that of a witness who swore that six or seven years ago the father had asked him what wages he was getting, and said the plaintiff wanted \$12.50, and that he would give him \$12: *Held*, sufficient to go to the jury.—*Henricks v. Henricks, Administrator*, 447.

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